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September 22, 2006

VIA FACSIMILE AND OVERNIGHT MAIL

LaDonna Castanuela
Texas Commission on Environmental Quality
MC-105
P.O. Box 13087
Austin, TX 78711-2087

Re: Request for Contested Case Hearing
Granting of TPDES Permit
Chevron Phillips Chemical Company LP
TPDES Permit No. WQ0000359000 (TX 0004839)

Dear Ms. Castanuela:

Friends of the Earth, through its counsel, Terris, Pravlik & Millian, LLP, requests a contested case hearing regarding the decision to amend TPDES permit number WQ0000359000. On August 23, 2006, the Executive Director of TCEQ issued a decision approving the application made by Chevron Phillips Chemical Company LP ("CPCC") for a major amendment to CPCC's TPDES permit for the Orange Plant.[1/] The amended permit relaxes the amount of total suspended solids ("TSS") that CPCC is allowed to discharge.

Friends of the Earth objects to the relaxation of the TSS limits in CPCC's TPDES permit. Friends of the Earth has standing to challenge the decision to approve the permit because Friends of the Earth is an "affected person" under 30 TAC § 55.201. Friends of the Earth therefore timely files this request for a contested case hearing in opposition to the approval of CPCC's application for an amended permit, in compliance with 30 TAC §§ 55.201, .203, .205, .209, and .211, as set forth below.

[1/]The major amendment was approved in conjunction with the reissuance of the permit.

A. FRIENDS OF THE EARTH'S REQUEST FOR A CONTESTED CASE HEARING IS BASED ON ISSUES TIMELY RAISED DURING THE COMMENT PERIOD

The request of Friends of the Earth ("FOE") for a contested case hearing is based on issues timely raised during the comment period TCEQ published the notice of application for this permit, along with a draft permit and preliminary decision, on May 22, 2006. FOE filed comments on the draft permit and the preliminary decision on June 20, 2006. These comments were timely filed, as stated in the Executive Director's Response to Public Comment. FOE's comments set forth specific objections to the backsliding in the TSS limit proposed by the draft permit. FOE's comments raised a legal objection to the relaxing of the TSS limit under the anti-backsliding rule and challenged the factual premises for the proposed relaxation. FOE's request for a contested case hearing is based on these legal and factual challenges.

B. FRIENDS OF THE EARTH'S REQUEST FOR A CONTESTED CASE HEARING IS BEING TIMELY SUBMITTED

FOE's request for a contested case hearing is being timely submitted within 30 days of the date of the Decision of the Executive Director. Under 30 TAC § 55.201(a), a request for a contested case hearing must be filed "no later than 30 days after the chief clerk mails * * * the executive director's decision." While the Decision of the Executive Director does not state the date on which it was mailed, it is dated August 23, 2006. This request for a contested case hearing is being filed within 30 days of August 23, 2006.

C. FRIENDS OF THE EARTH MEETS THE REQUIREMENTS FOR A REQUEST FOR A CONTESTED CASE HEARING BY AN ASSOCIATION

FOE meets all of the requirements for standing as an association whose members are "affected persons" under 30 TAC §§ 55.201, .203, and .205. As a result of CPCC's TSS discharges, the individual members of Friends of the Earth suffer injuries in fact to their aesthetic and recreational interests that are not common to the general public, as discussed below.

1. The U.S. District Court for the Eastern District of Texas Has Found That Friends of the Earth Meets the Associational Standing Requirements to Oppose CPCC's Excess Discharge of TSS from the Orange Plant

FOE filed a citizen suit in 1994 under Section 505 of the Clean Water Act against Chevron Chemical Company, which, following a merger, changed its name to Chevron Phillips Chemical Co. The suit, which is still pending, focuses on CPCC's violation of the TSS limit in the permit. *Friends of the Earth v. Chevron Chemical Co.*, E.D. Tex, Civ. Nos. 1:94CV434, 1:94CV580. CPCC challenged FOE's standing to bring the action, "vociferously" arguing that the individual members

of Friends of the Earth would not have standing to sue individually. Findings of Fact and Conclusions of Law (attached as Exhibit 1), p. 4. On July 20, 2004, the Court rejected this challenge in its Findings of Fact and Conclusions of Law. After conducting a thorough factual and legal analysis, the Court held that FOE has standing to bring the citizen suit on behalf of its members.

The Court's ruling that FOE has standing in its lawsuit against CPCC demonstrates that FOE is an "affected person" for the purpose of requesting a contested case hearing before the TCEQ. The Court's Findings of Fact and Conclusions of Law addressed the same issues concerning the discharge of the same pollutant, at the same location, as are involved in FOE's challenge to CPCC's current permit application. FOE incorporates herein the Court's Findings of Fact and Conclusions of Law ("Findings and Conclusions") for purposes of establishing that it has standing to request a contested case hearing.

2. The Proposed Increase in TSS Discharges Will Adversely Affect the Waters that Are Used by Friends of the Earth's Members for Recreation and Aesthetics

As the District Court found, "[i]t is undisputed that TSS makes water dirty and opaque" and "adversely affect[s] fish populations as well as water quality." Findings and Conclusions, p. 9. The increase in TSS discharges contemplated by the amended permit will further harm the quality, clarity, and aquatic life of the receiving waters. The members of FOE who use those waters for aesthetic and recreational purposes will therefore be specifically and directly harmed by the proposed increase in TSS discharges.

3. Since the Members of Friends of the Earth Suffer Specific Injuries-in-Fact from CPCC's TSS Discharges that Are Not Common to the General Public, They Would Have Standing to Request a Contested Case Hearing as Individuals

The Court found, and we presently allege, that four members of FOE, Delaine Sweat, Margaret Green, Opal Fruge, and Rodney Crowl, have suffered injuries in fact from CPCC's TSS discharges at the Orange Plant. Findings and Conclusions, pp. 4-6. CPCC's TSS discharge reaches Sabine Lake, "only about four miles [away] at most" from the Orange Plant, a distance "well within the range" of distances found by courts to confer standing. *See* Findings and Conclusions, p 8. FOE's members have a legal right to use the natural resource of Sabine Lake, and to enjoy and recreate there.

FOE member Delaine Sweat previously walked, drove along, and fished in Sabine Lake, but stopped doing so because the water appeared polluted. Margaret Green fished and boated in Sabine Lake, but will not do so routinely because of the reduced aesthetic beauty of Sabine Lake. Opal Fruge no longer boats and fishes on Sabine Lake because of the water's appearance and condition. Rodney Crowl stopped visiting Sabine Pass to eat seafood because he was concerned about the

condition of the fish caught in Sabine Lake. The Court found, and we allege, that these members of FOE have legitimate aesthetic and recreational interests in the natural resource of Sabine Lake and that CPCC's TSS discharges at the Orange Plant adversely affect these interests by damaging the water quality of Sabine Lake. The Court concluded, and we allege, that these members have suffered injury in fact from CPCC's TSS discharges.

The legal right of FOE's members to use the natural resource of Sabine Lake, and to enjoy and recreate at Sabine Lake, will be adversely affected by CPCC's application. FOE's members have a justiciable interest in enforcing the Clean Water Act and regulations under the Act, specifically the anti-backsliding rule in 40 C.F.R. 122.44(1).

The members of FOE identified above suffer specific injuries-in-fact to their aesthetic and recreational interests that are not common to the general public. While the general public will be harmed if CPCC backslides and causes more water pollution, the members of FOE will be uniquely and particularly harmed because they specifically seek to enjoy Sabine Lake for recreation and aesthetics, and the actual recreational and aesthetic benefits that they have specifically enjoyed at Sabine Lake will be further damaged by increased TSS discharges.

Moreover, FOE and its members are adversely affected by the increase in the TSS limit in terms of the relief that they seek in their pending lawsuit. The suit seeks injunctive and civil penalty relief to enforce the TSS limit. Obviously, relaxation of the limit negatively impacts the relief they might obtain.

4. Friends of the Earth Meets the Other Requirements for a Request for a Contested Case Hearing by a Group or Association

In addition to finding that the members of FOE would have standing to sue CPCC for its TSS discharges as individuals (a finding which satisfies the requirements of 30 TAC § 55.205(a)(1)), the Court further concluded that the interests FOE sought to protect by opposing CPCC's TSS discharges in the lawsuit were germane to its purpose as an organization. Findings and Conclusions, p. 4. FOE has promoted a broad agenda of environmental awareness and improvement for years. Accordingly, the interests that FOE seeks to protect by opposing the proposed backsliding of CPCC's TSS limits are germane to the pursuit of environmental improvement that is the reason for FOE's existence. FOE's request for a contested case hearing therefore meets the requirements of 30 TAC § 55.205(a)(2).

The Court found that there was no need for FOE's members to participate in the civil lawsuit. Findings and Conclusions, p. 4. Similarly, neither the claim asserted nor the relief requested in FOE's request for a contested case hearing requires the participation of the individual

members of FOE. FOE's request for a contested case hearing therefore meets the requirements 30 TAC § 55.205(a)(3).

Due to their volume, FOE has not attached the testimony and other materials from the District Court case upon which standing was established. If requested, FOE will provide these materials.

D. SUMMARY OF DISPUTED FACTUAL AND LEGAL ISSUES

Under 40 C.F.R. 122.44(l), a reissued or renewed permit must have effluent limits, standards, and conditions that are at least as stringent as the previous permit, with very narrow exceptions. As EPA described this long-standing requirement when it adopted the exceptions to it in 1984 (49 Fed. Reg. 38019 (Sept. 26, 1984)):

> This provision prohibited the reissuance of an NPDES permit with limitations, standards, and conditions less stringent than those in the previous permit unless the circumstances on which the previous permit had been issued had materially and substantially changed and constituted cause for permit modification or revocation.

This provision, which is referred to as the anti-backsliding rule, prohibits TCEQ from issuing a permit for this facility that is less stringent unless the cause exception is satisfied. FOE contends that the cause exception has not been satisfied.

FOE disputes that the backsliding of CPCC's TSS limit satisfies the "material and substantial change" exception to the anti-backsliding rule. FOE's objection to the backsliding involves several different disputes of law, fact, and the application of law to facts, all of which were raised in FOE's comments. The discussion below is meant merely to list the disputed issues of law and fact for the purpose of compliance with 30 TAC § 55.201(d)(4). FOE requests a contested case hearing so that it may provide full legal briefing and evidentiary support for all the disputed issues summarized below.

1. Disputed Issues of Law

a. Backsliding Cannot Be Justified when the Applicant's Treatment Facilities Are Inadequate or when the Applicant Fails to Follow Rudimentary Best Management Practices

FOE's first comment raised the legal argument that the "material and substantial change" exception to the anti-backsliding rule may not be used when the applicant's treatment facilities are

inadequate. The Executive Director's Response to FOE's first comment did not address this legal argument. FOE continues to assert this legal objection to the decision to relax CPCC's TSS limit.

FOE's sixth comment similarly raised the legal argument that the "material and substantial change" exception to the backsliding rule may not be used when the applicant has failed to follow rudimentary best management practices (BMP). The Executive Director's Response to FOE's sixth comment observed that the applicant may use a variety of BMP's to meet required effluent limits, but did not squarely address the argument that backsliding may not be allowed for an applicant who fails to follow rudimentary BMP's. FOE continues to assert this legal objection.

b. The Change that Is Cited as Justifying Backsliding Must Actually Make It More Difficult for the Permitholder to Meet Current Discharge Limits in Order to Qualify for the Exception to the Anti-backsliding Rule

CPCC claims that "a major change that has occurred at the Orange Plant that justifies an exemption from the anti-backsliding provisions is the permanent shutdown and demolition of the LDPE plant, boiler house and the pilot plant." *See* Letter from CPCC to TCEQ referencing TCEQ's proposal to deny CPCC's request for an increase in its TSS permit limits (hereafter "CPCC Comment Letter"), p. 2. CPCC further claims that "[s]torm water from these areas will contain TSS concentrations that are typical of sites where 'industrial activities' are conducted, and TSS limits at Outfall 001 should account for these changed operations at the Orange Plant." CPCC Comment Letter, p. 2. CPCC contends that these changes "constitute a 'material and substantial alteration' of the Orange Plant and therefore should exempt the requested TSS increase from the anti-backsliding provisions as provided at 40 C.F.R. 122.41(1)(2)(i)(A)." CPCC Comment Letter, p. 2. The Executive Director appears to have relied upon these claims by CPCC.

In fact, none of these changes increase the TSS concentration in the storm water discharged through Outfall 001. The changes are either neutral or reduce the TSS.

Prior to its shutdown and demolition, the LDPE plant constituted an impervious, concrete surface for storm water runoff purposes. Following its demolition, the area was converted from concrete to grass. Permit Application, Attachment 9. Grass surfaces, of course, produce less flow and fewer solids than concrete surfaces. Indeed, the area was more "urbanized" before LDPE was removed than after. Therefore, the demolition of the LDPE plant justifies a reduction in the TSS limit, not an increase.

Nevertheless, the Executive Director, in Response 3, stated that the reason for the relaxation of CPCC's TSS limits is a change of categorization of the storm water runoff from this area. Previously, the storm water was characterized as wastewater from facilities producing organic

chemicals, plastics, and/or synthetic fibers and therefore covered by the Organic Chemical, Plastics and Synthetic Fibers (OCPSF) guidelines (40 C.F.R. Part 414).

Now that several structures at the Orange Plant have been removed, the storm water has been characterized as non-process storm water that "is not subject to federal effluent guidelines and any technology-based effluent limits are based on best professional judgement [sic]." Fact Sheet and Executive Director's Preliminary Decision, p. 7. There is no justification for using best professional judgment ("BPJ") to relax this limit.[2/] BPJ dictates that, where the changed circumstances will make compliance with the existing permit limit easier, the permit limit not be relaxed. Thus, in an analogous situation, the backsliding rule prohibits relaxation of a BPJ-based limit in the face of a later-established effluent guideline limit that is less stringent. 40 C.F.R. 122.44(l)(2). The Executive Director has failed to demonstrate that the changes to the CPCC facility made it harder for CPCC to meet its TSS limit by producing more flow or solids than can be handled by adequate treatment facilities.

The Executive Director's Response 3 implicitly stated that a change in the technical, categorical classification of the storm water can suffice to meet the "material and substantial change" exception to the anti-backsliding rule, even where there is no relationship between the change to the facility and the discharges from that facility. The changes to the CPCC facility do not make it harder for CPCC to meet its current TSS limit -- in fact, they make it easier for CPCC to comply. Nonetheless, the Executive Director appears to assert that the changes can justify increasing the TSS limit.

c. An Applicant's Treatment and Control Facilities Must Be Considered in Determining whether the Applicant Meets the Exception to the Anti-backsliding Rule

The other changes upon which CPCC based it claim of a material change is the demolition of the pilot plant and the boiler house. However, each of these changes represents a neutral change from the standpoint of storm water. The pilot plant is located in an area of the plant that during storm events is tributary to the rice gates. CPCC's standard operating procedure is to close the rice gates during storm events. The effect of this is that all storm water in the area tributary to the rice gates is held back from the WTP during storm events.[3/] Following the storm event, the rice gates are opened and the water is bled into the WTP. Accordingly, the rice gates serve, in effect, as a storm water surge tank. During a storm event, none of the storm water runoff from the pilot plant area ever

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[2/] In his response to comments, the Executive Director stated that the limits are based on the Multi-Sector General Permit Response 3. He apparently meant that BPJ was relied on.

[3/] CPCC admitted during the course of the litigation that the rice gates have never been overtopped.

reaches the WTP. Consequently, this storm water does not affect the level of TSS in the discharge during a storm event.[4/]

The boiler house, like the LDPE area, is in an area that is not tributary to the rice gates. Nevertheless, its demolition also represents a neutral change in terms of storm water flows and TSS loads in that storm water. Both before and after demolition, the boiler house constituted an impervious, concrete surface. Therefore, the storm water flows and TSS load in the storm water from this area remains the same. Furthermore, the steam that is now purchased as a substitute for the steam generated by the old boiler house is "condensed after exiting the process and drained to the fire pond, which drains to the wastewater treatment system." Permit Application, Attachment 9. The fire pond is in the area of the plant that is tributary to the rice gates. Therefore, this steam condensate does not reach the WTP during a storm event.

FOE commented that the rice gates at the facility prevent any potential excess storm runoff arising from the demolition of the pilot plant and the boiler house from actually affecting the TSS discharges at the Orange Plant during storm events.[5/] The Executive Director's Response 3 and Response 5 do not dispute this factual observation. However, in Response 5 the Executive Director argued that, since CPCC's decision to use the rice gates is optional and cannot be required by the TPDES permit, it cannot be considered in calculating the permit limitations.

As noted above, the Executive Director stated that the basis for the relaxed TSS limit is best professional judgment. Best professional judgment requires consideration of the treatment and management practices employed at the facility. While the Executive Director is correct that the

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[4/]We note that this is not the first instance where CPCC has misrepresented facts about its stormwater flows to TCEQ. On August 3, 1994, in response to an Administrative Order that was issued by EPA for CPCC's TSS violations, CPCC wrote to EPA detailing the interim measures it would take. FOE Comments, Enclosure 3. On August 23, 1994, CPCC sent almost the same letter to TNRCC, which is now TCEQ. *Id.*, Enclosure 4. CPCC identified a stormwater surge tank as one of the interim measures that it was using as a storm surge control and stated that "[t]his system is now capable of retaining 2.2 million gallons." Enclosure 3, p. 2; Enclosure 4, p. 2. CPCC failed to mention that the surge tank would only retain stormwater already retained by the rice gate. CPCC admitted that the tank accomplish nothing more than was already accomplished by the rice gates during FOE's pending case.

Although CPCC mentions the rice gates in Attachment 1 to its permit application, it does not reveal the fact that the storm and process waters collected in the rice-gated area do not reach the WTP during storm events and are therefore irrelevant to an assessment of the appropriate TSS limit for the stormwater fraction of the discharge.

[5/]Compliance with the TSS limit is only an issue during storm events.

permit cannot include a requirement that the rice gates be employed, the Executive Director is incorrect to the extent that he indicated that use of the rice gates cannot be considered in establishing a permit limit based on best professional judgment. Indeed, consideration of treatment and other control facilities is mandatory in establishing a BPJ-based effluent limit. 40 C.F.R. 125.3(d).[6/]

d. The Effect of Backsliding on Aquatic Life Uses Must Be Considered in Determining whether Backsliding Is Justified

FOE's seventh comment stated that the negative impact of increased TSS discharges on aquatic life is a factor weighing against a finding that the backsliding is justified. The Executive Director's Response 7 stated that the high aquatic life use of the receiving water had no impact on his Decision. Response 7 therefore implied that the Executive Director need not consider the negative impact of backsliding on aquatic life in deciding whether an exception to the anti-backsliding rule is justified. FOE contends that the impact on water quality must always be considered in establishing permit limits, including limits that involve backsliding.[7/]

2. Disputed Issues of Relevant and Material Fact

a. CPCC's Treatment Facilities and Procedures Are Inadequate

FOE's first comment, as explained in greater detail in its third comment, raised the factual issue of the adequacy of CPCC's treatment facilities and stated that CPCC's treatment facilities are inadequate as found by the district court (*see* Findings and Conclusions, pp 13-16). FOE made related factual assertions in several of its other comments. Comment 2 stated that CPCC's maintenance of its Cube Pond treatment facility is inadequate, because it has allowed solids to accumulate in the pond, and these solids are scoured out during heavy rainfall and contribute to TSS discharges. Comment 6 stated that CPCC has failed to institute adequate control measures to stabilize materials that would contribute solids to the discharge during a storm event. FOE also stated that CPCC's failure to institute adequate control measures constitutes a failure to follow a rudimentary best management practice.

[6/]We note that Friends of the Earth did not have the opportunity to assert this argument in its Comments. The Executive Director made this legal interpretation of the anti-backsliding rule in the Response to Public Comment after comments had been submitted.

[7/]We note that Friends of the Earth did not have the opportunity to assert this argument in its Comments. The Executive Director made this interpretation of the anti-backsliding rule in the Response to Public Comment after comments had been submitted.

The Executive Director replied in Response 1 and Response 2 that CPCC's treatment facilities have a record that "demonstrates general compliance with the specified limitations for TSS on a year round basis." This statement seems to imply a disagreement with FOE's factual assertions about the adequacy of CPCC's treatment facility. This factual disagreement is relevant and material because FOE's factual assertion, when joined with the legal argument in its first comment that backsliding may not be permitted when treatment facilities are inadequate, would preclude the permit's backsliding.

Furthermore, the Executive Director's conclusion that the treatment facilities provide for compliance with the TSS limit is directly inconsistent with his conclusion that relaxation of the TSS limit is justified under the anti-backsliding rule. If the treatment facilities provide for compliance, there is no justification for relaxing the limit.

b. The Changes to the CPCC Facility Will Decrease, Rather than Increase, the Amount of Storm Runoff and Waste Solids

The Fact Sheet and Executive Director's Preliminary Decision ("Preliminary Decision"), page 21, stated that since changes in the CPCC facility have "resulted in an increase of storm water runoff from uncovered/unpaved areas," the relaxed TSS limit is justified. As discussed above (pp. 5-7), FOE disputes this factual assertion.

The Preliminary Decision also stated that the changes at the CPCC facility will have "a significant impact on the quality of the discharge with respect to total suspended solids." FOE likewise disputes this factual assertion in its third and fourth comments, on the ground that the change from impervious concrete to grass should actually produce less TSS, not more. Moreover, the demolition of the LPDE plant should reduce the TSS in CPCC's discharge, rather than increasing it, because the closure of the LPDE plant eliminates a significant source of the wastewater stream, thereby leaving more capacity in the treatment facilities for the treatment of storm water at the Orange Plant.

The Executive Director's Response 3, Response 4, and Response 5 do not directly contradict these facts. Indeed, the Executive Director seems to concede FOE's factual statements, saying in Response 4 that "[t]he change in contributing waste stream flows had minimal influence on the calculation of the TSS limits" and citing a change in the categorization of the waste stream flows as the primary reason for the change in TSS levels. However, the explanation given for the backsliding in the Executive Director's Preliminary Decision relies on CPCC's claims regarding the changes. In addition, the Executive Director's Response 1 repeated the assertion that the changes at the facility have increased storm runoff and affected the discharge of TSS. These disputed factual assertions are relevant and material because they are essential to determining whether the changes at the CPCC facility justify backsliding with regard to the TSS limit.

3. Disputed Issue of the Application of Law to Fact

Each of FOE's comments disputes the application of the law of the "material and substantial change" exception in the anti-backsliding rule to the facts regarding the changes at the Orange Plant.

E. CONTACT INFORMATION

Carolyn Smith Pravlik, counsel for FOE, is responsible for receiving all communications and documents for the group pursuant to 30 TAC § 55.201(d)(1). Her contact information is as follows:

Carolyn Smith Pravlik
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We appreciate your consideration of our request for a contested case hearing. Please do not hesitate to contact me if you have any questions regarding our request.

Sincerely,

Carolyn Smith Pravlik
Counsel for Friends of the Earth

Enclosure 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FRIENDS OF THE EARTH, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 1:94-CV-434
	§	Case No. 1:94-CV-580
CHEVRON CHEMICAL COMPANY,	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Plaintiff Friends of the Earth, Inc. ("Friends of the Earth") is a non-profit corporation organized under the laws of the District of Columbia. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 827 (5th Cir. 1997). For years, Friends of the Earth has "promote[d] a broad agenda of environmental awareness and improvement projects." *Id.* Friends of the Earth has sought to implement this agenda, in part, through lawsuits filed in district courts, including this one. *Id.* at 827 & n.1.

Defendant Chevron Chemical Company ("Chevron") manufactures polyethylene at its plant in Orange, Texas ("the Orange Plant"). *Id.* at 827. Under its National Pollution Discharge Elimination System ("NPDES") permit, Chevron discharges process water and storm water from the Orange Plant into Round Bunch Gully, which flows into Cow Bayou, and then to the Sabine River and into Sabine Lake. *Id.* Chevron's NPDES permit limits the amount of total suspended solids ("TSS")[1] that Chevron may discharge. *Id.* "Between October 1990 and January 1994, Chevron

[1] TSS is comprised of dirt, polyethylene particles, and biological solids. Tr. at 72, 74.

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exceeded its TSS limits." *Id.*

Friends of the Earth eventually learned of these developments. *See id.* The organization filed a private civil enforcement lawsuit in July 1994 against Chevron under the Federal Water Pollution Control Act, 33 U.S.C. §1365 (1994) ("the Clean Water Act"). *Id.*[2] Friends of the Earth alleged that Chevron had committed numerous violations of its NPDES permit. *Id.* After its lawsuit was filed, Friends of the Earth filed a second lawsuit alleging additional permit violations by Chevron. *Id.* This court consolidated both cases. *Id.*

Both Friends of the Earth and Chevron filed motions for summary judgment. The court denied Friends of the Earth's motion for summary judgment and granted in part and denied in part Chevron's motion for summary judgment. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 83-84 (E.D. Tex. 1995). Notably, the court found that a genuine issue of material fact existed regarding Friends of the Earth's TSS claims. *Id.* at 83. The court, however, concluded that Chevron was entitled to summary judgment on Friends of the Earth's other claims. *Id.* at 83-84. The court found that Friends of the Earth's claim for injunctive relief and its claim for civil penalties were not moot. *Id.* at 84. Finally, the court concluded that Friends of the Earth had constitutional standing to bring this lawsuit. *Id.* at 74-77.[3]

The court held a three-day bench trial in January 1996. During that trial, Friends of the Earth presented four witnesses on the issue of constitutional standing: Delaine Sweat, Margaret Green, Opal Fruge, and Rodney Crowl. Tr. at 32-67. Friends of the Earth also presented Dr. Bruce Bell as

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[2] Chevron first gave the Environmental Protection Agency ("EPA") the required sixty days notice. *Id.*

[3] The court later entered an order saying that standing would be an issue for trial because a fact issue remained concerning standing.

[standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted).

An organization such as Friends of the Earth has standing to bring a civil action on behalf of its members if "(1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 555 (5th Cir. 1996) (citations omitted). Here, Chevron does not dispute that Friends of the Earth has met the last two prongs of this test. Instead, Chevron claims the court should dismiss this lawsuit because Friends of the Earth's members would not have standing to sue individually.

In order to have standing to sue individually, a member of an organization must meet three requirements. Specifically, a member "must show that: (1) he has suffered an actual or threatened injury as a result of the actions of the defendant; (2) the injury is 'fairly traceable' to the defendant's actions; and (3) the injury will likely be redressed if he prevails in his lawsuit." *Id.* at 556 (citations omitted); *see also Save Our Community*, 971 F.2d at 1160. Chevron vociferously argues that Friends of the Earth's members meet none of these three requirements. The court consequently examines whether Friends of the Earth's members meet each of these requirements.

A.

To establish individual standing, a party must show that it has suffered injury in fact. *See, e.g., Friends of the Earth, Inc v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 187 (2000). As the Fifth Circuit has observed, "the threshold for the injury requirement is fairly low." *Sierra Club, Lone Star Chapter*, 73 F.3d at 557 n.23 (citations omitted). Because a party's "injuries need not be large, an 'identifiable trifle' will suffice." *Pub. Interest Research Group of N.J., Inc v. Powell*

Here, as in *Laidlaw*, Friends of the Earth's members have legitimate recreational and aesthetic interests. *See* Tr. at 32-67. Each of Friends of the Earth's members who testified at trial complained that their recreational activities have been adversely affected. *See id.* Notably, Delaine Sweat testified that she previously walked, drove along, and fished in Sabine Lake, but stopped doing so because the water appeared cloudy and polluted. *Id.* at 44-48. Margaret Green testified that she had fished and boated in Sabine Lake, but would not do so consistently due to the reduced aesthetic beauty of Sabine Lake. Tr. at 60-62. Opal Fruge testified that she no longer boats and fishes on Sabine Lake because of the water's appearance and condition. *Id.* at 34-36. Finally, Rodney Crowl testified that he had visited Sabine Pass to eat seafood, but stopped doing so because he was concerned about the quality and condition of fish caught in Lake Sabine. *Id.* at 56.

It is well settled that harm to aesthetic, environmental, or recreational interests constitutes an injury in fact. *See, e.g., Laidlaw*, 528 U.S. at 183-84; *Morton*, 405 U.S. at 734-35. The injuries asserted by Friends of the Earth's members in *Laidlaw* are similar to the injuries asserted by Friends of the Earth's members in this case. *Compare Laidlaw*, 528 U.S. at 183-84, *with* Tr. at 32-67. Friends of the Earth's members have sufficiently demonstrated that Chevron's TSS discharges adversely affected their recreational interests. Consequently, Friends of the Earth's members have suffered injuries in fact. *Id.*; *see also Sierra Club, Lone Star Chapter*, 73 F.3d at 556-57.

B.

The second requirement for individual standing is that the injuries suffered by an individual must be "fairly traceable" to the defendant's permit violations. *See, e.g., Sierra Club, Lone Star Chapter*, 73 F.3d at 557. Like the requirement of injury in fact, this requirement is not a demanding one. *See, e.g., Save Our Community*, 971 F.2d at 1161. Indeed, "[t]he requirement that plaintiff's

injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that [the] defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72; *see also Save Our Community*, 971 F.2d at 1161. Nor must plaintiffs "pinpoint[] the origins of particular molecules" in order to satisfy this requirement. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc).

Instead, a plaintiff satisfies this requirement by showing that a defendant has

> 1) discharged some pollutant in concentrations greater than allowed by its permit
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that
> 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Powell Duffryn Terminals, Inc., 913 F.2d at 72 (footnote omitted). This test has been applied in Clean Water Act cases by the Fifth Circuit. *Sierra Club, Lone Star Chapter*, 73 F.3d at 557. Accordingly, the court examines whether Friends of the Earth's witnesses satisfy the *Powell Duffryn* test.

1.

Regarding the first prong of the *Powell Duffryn* test, Chevron violated the TSS limitations in its NPDES permit sixty-five times. *See* Pl.'s Ex. 8 (Trial–Jan. 17, 1996). Consequently, Chevron has discharged TSS at levels greater than allowed by its NPDES permit. Thus, Friends of the Earth's members have satisfied the first prong of the *Powell Duffryn* test.

2.

Regarding the second prong of the *Powell Duffryn* test, Chevron avers that it does not discharge TSS into a waterway in which Friends of the Earth's members have an interest that is or

may be adversely affected. At trial, Friends of the Earth's witnesses complained mainly about pollution in Sabine Lake. *See, e.g.*, Tr. at 32-33, 43, 55, 59-60. Chevron points out that it does not discharge TSS directly into Sabine Lake. *See* Def.'s Exs. K, L. Instead, Chevron's TSS discharge flows into Round Bunch Gully, then into Cow Bayou, and then into the Sabine River, which empties into Sabine Lake. Def.'s Ex. L. Thus, there are intermediate bodies of water between the Orange Plant and Sabine Lake. *See id.*

Although the Orange Plant is not situated on the shore of Sabine Lake, the distance between these two locations is only about four miles at most. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 75 (E.D. Tex. 1995). Contrary to what Chevron implies, there is no "mileage or tributary limit for plaintiffs proceeding under the citizen suit provision of the CWA." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996). Moreover, the distance between the Orange Plant and Sabine Lake is well within the range of distances in cases where courts have found the "fairly traceable" requirement to have been satisfied. *Compare Chevron Chem. Co.* 900 F. Supp at 75, *with Laidlaw Envtl. Servs.*, 528 U.S. at 181-84, *and Gaston Copper Recycling Corp.*, 204 F.3d at 161-62.

Here, Chevron has discharged TSS that, eventually, reached Sabine Lake. Friends of the Earth's members recreate in, on, near, and around Sabine Lake. Tr. at 32-33, 43, 55, 59-60. Because their recreational interests have been adversely affected by Chevron's TSS discharges, Friends of the Earth's members have satisfied the second prong of the *Powell Duffryn* test.[5]

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[5] Admittedly, the Fifth Circuit once noted, in *dictum*, that "some 'waterways' covered by the CWA may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing." *Sierra Club, Lone Star Chapter*, 73 F.3d at 558 n.24 (citations omitted). Soon after *Sierra Club*, the Fifth Circuit in *Crown Central Petroleum* found that the plaintiffs had not satisfied the "fairly

3.

Regarding the third prong of the *Powell Duffryn* test, the court finds that Chevron's TSS discharge contributed to the kinds of injuries alleged by Friends of the Earth's members. Friends of the Earth's members testified at trial that Sabine Lake and the Gulf of Mexico appeared both murky and polluted. Tr. at 35, 45, 61. Moreover, Friends of the Earth's members claimed that their recreational interests in, on, and near Sabine Lake have been negatively affected by the appearance of the water in Sabine Lake. *Id.* at 32-33, 43, 55, 59-60.

It is undisputed that TSS makes water appear dirty and opaque. *Id.* at 74. Moreover, high levels of TSS adversely affect fish populations as well as the quality of water. *Id.* Chevron previously discharged TSS in quantities that exceeded its permit limitations. Moreover, Chevron's TSS discharge eventually reached Sabine Lake. Because its TSS discharge adversely affected a body of water in which Friends of the Earth's members have recreational interests, Chevron contributed to the recreational injuries that Friends of the Earth's members suffered. *See Powell Duffryn*

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traceable" requirement because the refinery at issue was eighteen miles from the body of water used by plaintiffs. 95 F.3d at 361-62. Relying on *dictum* in *Sierra Club* and on the holding of *Crown Central Petroleum*, Chevron contends that the distance between the Orange Plant and Sabine Lake is too vast for the court to find that Friends of the Earth's members have met the "fairly traceable" requirement.

Here, however, the distance between the Orange Plant and Sabine Lake is far less than the relevant distance in *Crown Central Petroleum*. *Id.* at 361. Friends of the Earth has shown and the court has concluded that Chevron's TSS discharge eventually flows into Sabine Lake. Additionally, Friends of the Earth has shown that its members have legitimate recreational interests in Sabine Lake. Consequently, *Crown Central Petroleum* is inapposite. Although Friends of the Earth's interest in Galveston Bay in *Crown Central Petroleum* "passe[d] Article III bounds," *id.*, Friends of the Earth's interest in Sabine Lake in this lawsuit is within Article III bounds.

Terminals, Inc., 913 F.2d at 72.[6]

C.

The final requirement for individual standing is redressability, which means that a plaintiff's injuries are "likely to be redressed by a favorable [judicial] decision." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quotation & footnote omitted). This requirement concerns "the connection between the plaintiff's injury and the judicial relief sought." *Save Our Comm.*, 971 F.2d at 1161 (citation omitted). The possibility that the relief sought will redress a plaintiff's injuries must be not merely speculative, but likely. *See Laidlaw Envtl. Servs, Inc.*, 528 U.S. at 187.

Here, Friends of the Earth, on behalf of its members, seeks an award of civil penalties from Chevron. Although civil penalties are paid to the United States Treasury and not given to a successful plaintiff, the deterrent effect of an award of civil penalties on a defendant serves "[t]he general public interest in clean waterways." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 73. Consequently, it is well settled that if an organization seeks an award of civil penalties on behalf of its members, the redressability requirement is satisfied. *See Laidlaw Envtl. Servs., Inc.*, 528 U.S. at

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[6] Chevron contends that Friends of the Earth's members must demonstrate that Chevron's TSS discharge in particular injured one of Friends of the Earth's members. This argument, however, is untenable under Fifth Circuit precedent. As the Fifth Circuit noted in *Sierra Club, Lone Star Chapter*, a member of an organization only needs to show that the defendant's discharge contributed to the types of recreational injuries alleged by that member. 73 F.3d at 558. A plaintiff need not "show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72; *see also Save Our Comm.*, 971 F.2d at 1161. This argument is unpersuasive.

187.[7]

Such a situation exists in this lawsuit. Because Friends of the Earth seeks an award of civil penalties, the injuries of its members are likely to be redressed by a favorable decision in this case. *See id.* Consequently, the court finds that Friends of the Earth has satisfied the redressability requirement. *Id.*[8]

The court finds that Friends of the Earth's members would have standing to sue Chevron individually. Thus, Friends of the Earth has constitutional standing. The court now considers the question of whether Friends of the Earth has statutory standing.

III.

To establish statutory standing under the Clean Water Act, plaintiffs must allege "a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). The Clean Water Act does not, however, "permit citizen [law]suits for wholly past violations." *Id.* at 64. Thus, a plaintiff must "make a good-faith allegation of continuous or intermittent violation" at the beginning of the lawsuit. *Id.*

The Fifth Circuit has stated that a plaintiff may prove an ongoing violation either

> (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a

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[7] *See also Powell Duffryn Terminals, Inc.*, 913 F.2d at 73; *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695 (4th Cir. 1989); *Pub. Interest Research Group of N.J. v. Star Enter.*, 771 F. Supp. 655, 664 (D.N.J. 1991); *Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1200-02 (D.N.J. 1985).

[8] Chevron contends that Friends of the Earth's claims cannot be redressed by a favorable decision in this lawsuit because this lawsuit is moot. For reasons to be explained, the court finds that this lawsuit is not moot. Thus, this argument is unpersuasive.

> continuing likelihood of recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.

Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991) (quotation omitted). Under the first avenue, proof of post-complaint violations establishes statutory standing. *See id.*[9] Moreover, even proof of a single post-complaint violation conclusively establishes statutory standing. *Id.* at 1065 n.12.

Here, Chevron violated its TSS limitations three times after Friends of the Earth filed its lawsuit. Chevron exceeded its TSS limitations on April 10, 1995, Pl.'s Exs. 8 & 55 (Trial–Jan. 17, 1996), on August 30, 1996, Def.'s Ex. R (Hearing–Oct. 13, 1998), and on September 17, 1997. Def.'s Ex. V (Hearing–Oct. 13, 1998) Chevron has asserted the affirmative defense of upset for each of these TSS violations. *See* 40 C.F.R. § 122.41(n) (2000). The court examines each claim in turn.

A.

Chevron contends that its TSS violation on April 10, 1995 was an upset. An upset is "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." *Id.* § 122.41(n)(1).[10] An upset, if proven, is an affirmative defense to a permit violation. *Id.* § 122.41(n)(2).

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[9] *See also Natural Res. Def. Council, Inc v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 501-02 (3d Cir. 1993); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Inc.*, 844 F.2d 170, 171-72 (4th Cir. 1988) (per curiam).

[10] Chevron's NPDES permit contains an almost identical definition. Pl.'s Ex. 3, Part III(B)(5). Friends of the Earth acknowledges that Chevron's NPDES permit is technology-based.

"[T]he permittee seeking to establish the occurrence of an upset has the burden of proof." *Id.* § 122.41(n)(4). Additionally, the permittee must demonstrate, through relevant evidence, the following:

> (i) An upset occurred and [] the permittee can identify the cause(s) of the upset;
> (ii) The permitted facility was at the time being properly operated; and
> (iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).
> (iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

Id. § 122.41(n)(3)(i)-(iv). A permittee's failure to establish compliance with any of these four requirements prevents that permittee from claiming that an upset occurred. *See id.* § 122.41(n)(3). If the defendant proves each of these four conditions, the court must then evaluate whether the incident at issue qualifies as an upset under section 122.41(1). *See id.* § 122.41(n)(1). Here, Chevron has satisfied all four conditions and thus may assert that upsets occurred.

There are, however, situations in which the upset defense is unavailable to a permittee. *See id.* Specifically, "[a]n upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation." *Id.* If a plaintiff proves that any of these situations existed, the upset defense is inapplicable. *See id.* Here, Friends of the Earth claims, among other things, that Chevron designed its treatment facilities improperly.

In designing a wastewater treatment plant, engineers must ensure that the facility is sufficient to handle the volume of runoff from rainstorms. To do so, engineers must choose a design storm in order to estimate the amount of runoff. The design storm must address two key factors: the total volume of runoff and the rate at which that runoff will occur. Both factors are affected by the

amount of rainfall, the duration of a rainstorm, and the physical characteristics of the wastewater treatment plant. In choosing a design storm, one should do so based on a significant amount of rainfall data. *See* Tr. at 87:22-31.

In correspondence with both the EPA and the TNRCC, Chevron informed both agencies that it had designed the treatment facility at the Orange Plant to handle a five-year, twenty-four hour storm event.[11] A five-year, twenty-four hour storm event is a statistical concept, not an actual storm. Tr. at 87:4. It represents the total rainfall that would result from a storm that occurs once every five years and lasts twenty-four hours. *Id.*; *see also* Pl.'s Ex. 65, p. 12.

Designing a wastewater treatment facility for a five-year, twenty-four hour storm means that the facility is "adequate to handle the total volume and the rate of runoff that would result from a storm that would occur on the average once every five years." *Id.* at 88:4-6. For Orange, Texas, the five-year, twenty-four hour storm will result in 7.3 inches of rain in a day. *Id.* at 88:29-31. In designing the wastewater treatment facility at the Orange Plant, Chevron represented to state and federal agencies that it had met this statistical standard.[12]

The record in this case proves that Chevron failed to meet this standard. Rather, Chevron

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[11] Pl.'s Ex. 55 (Letter of Apr. 20, 1995 from Dale W. Durr to Terry Lane of the EPA, p. 2) ("Our treatment facility was designed to treat a 5 year, 24 hour rainfall event . . . ."); Pl.'s Ex. 16 (Letter of Aug. 23, 1994 from Charles W. Miller to Georgie Volz of the TNRCC, p. 2) ("This system has been designed to hydraulically handle and treat the combined flows of all process waters and a 5 year 24 hour maximum precipitation event . . . .").

[12] *See supra* note 11. Additionally, various Chevron officials intimated during their depositions that Chevron had met this standard. Pl.'s Ex. 63 (Depo Tr. of Jeffrey Downing at 27:8-11) ("We were a little bit over 7 inches. So we were well within the 5-year, 24-hour event classification."); Pl.'s Ex. 9 (Depo. Tr. of Dale Durr at 86:16-18) ("All I am saying is the system was designed to handle a five-year, 24-hour maximum that we have seen. That was the basis for the design.").

selected a rainstorm that occurred on June 1, 1992 as the basis for the design of the wastewater treatment facility at the Orange Plant. Tr. at 89:20-23. Jeffrey Downing, an engineer and former employee at the Orange Plant, claims that Chevron made that choice because "some actual event was needed in order to base a design on." Pl.'s Ex. 63 (Depo. Tr. of Jeffrey Downing at 21:6-7).

Chevron has stated that the June 1992 rainstorm was the most severe rainstorm in the history of the Orange Plant. *Id.* (Depo. Tr. of Jeffrey Downing at 13:10-21); Tr. at 119:4-12. Chevron, however, has no data regarding how much rain fell on the Orange Plant during that storm. *See* Tr. at 90:9-10. Unfortunately, the rain gauge at the Orange Plant was broken. *Id.*

According to data maintained by the National Weather Service, the Jefferson County Airport received 3.35 inches of total rainfall on June 1, 1992. *Id.* at 90:2-6; *see also* Pl.'s Ex. 65, p. 20. Moreover, six and a half inches of rain fell on facilities near the Orange Plant. Tr. at 119:16-29. Thus, the rainfall during the June 1992 storm was less than the rainfall that would result from a five-year, twenty-four hour storm event. *See* Pl.'s Ex. 65, figure 6-3. Chevron's expert, Dr. Lial Tischler, previously acknowledged this disparity. Pl.'s Ex. 64 (Depo. Tr. of Lial F. Tischler at 40:12-14) (stating that "it appears that [the June 1st, 1992 storm] probably was not a five-year-24-hour event but something somewhat less than that").

Dr. Tischler never analyzed whether Chevron designed the wastewater treatment facility at the Orange Plant properly. Tr. at 591. Nor did he initially determine whether the June 1992 storm equaled the five-year, twenty-four hour storm. Pl.'s Ex. 64 (Depo. Tr. of Lial F. Tischler at 40:5-8). He did, however, admit that Chevron did not design the Orange Plant to withstand a five-year, twenty-four storm. *Id.* (Depo. Tr. of Lial F. Tischler at 40:12-14).

The concept of the five-year, twenty-four hour storm is not a required industry standard. Tr.

at 138. It is, however, the standard that Chevron sought to duplicate–yet failed to achieve–in designing the wastewater treatment facility at the Orange Plant. *See, e.g., id.* Thus, Chevron designed that facility improperly.[13] The affirmative defense of upset is inapplicable in this case and unavailable to Chevron. *See* § 122.41(n)(1).[14]

Because Chevron cannot assert the upset defense, Chevron is liable for the TSS violations that occurred on April 10, 1995, on August 30, 1996, and on September 17, 1997. *See id.*[15] Each of these post-complaint TSS violations, standing alone, establishes statutory standing. *See Carr*, 931 F.2d at 1065 n.12 ("[P]roof of an actual violation subsequent to the complaint is conclusive.").[16] Consequently, Friends of the Earth has established statutory standing. *See id.*

Chevron argues that each of its post-complaint TSS violations is an upset because it achieved ninety-nine percent compliance with its TSS limitations. Def.'s Post-Appeal Proposed Findings of

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[13] *Cf.* THE AMERICAN HERITAGE DICTIONARY 349 (1989) (defining the word "improper" to mean "[n]ot suited to needs or circumstances," "unsuitable," and "[n]ot consistent with fact"). Chevron's actual design of the wastewater treatment facility at the Orange Plant is inconsistent with what Chevron told the EPA regarding that facility as well as inconsistent with the five-year, twenty-four hour storm. Thus, the word "improper" aptly describes the Orange Plant's design.

[14] Indeed, as Friends of the Earth's expert, Dr. Bruce Bell, testified, if Chevron had designed the wastewater treatment facility at the Orange Plant to withstand a five-year, twenty-four hour storm, Chevron would not have committed post-complaint TSS violations. Tr. at 99:23-100:2.

[15] Because the court concludes that the wastewater treatment facility at the Orange Plant was improperly designed and does not meet the standard that Chevron itself chose, the court also concludes that the wastewater treatment facility at the Orange Plant is inadequate. The court need not, however, address the questions of whether Chevron committed operator error, whether Chevron properly maintained the Orange Plant, or whether the Orange Plant suffered from a lack of preventative maintenance.

[16] Consequently, the court need not answer the question of whether there was a likelihood of recurring violations by Chevron at the time Friends of the Earth sued Chevron.

Fact and Conclusions of Law at ¶ 94 (Dkt. #120). In making this argument, Chevron relies on *Chemical Manufacturers Association v. EPA*, 870 F.2d 177 (5th Cir. 1989), *reh'g granted, amended by* 885 F.2d 253, 256 (5th Cir. 1989), and on *American Petroleum Institute v. EPA*, 661 F.2d 340 (Former 5th Cir. 1981). Both cases, Chevron claims, support its interpretation of the upset defense.

In neither case, however, did the Fifth Circuit either interpret or examine what constitutes an upset. *See Chem. Mfrs. Ass'n*, 870 F.2d at 229-30; *Am. Petroleum Inst.*, 661 F.2d at 350-51. Nor did the Fifth Circuit hold that ninety-nine percent compliance with a technology-based NPDES permit mandates a finding that permit violations are upsets. *See Chem. Mfrs. Ass'n*, 870 F.2d at 229-30; *Am. Petroleum Inst.*, 661 F.2d at 350-51. Nor does Chevron's interpretation of the upset defense find either explicit or implicit textual support. *See* § 122.41(n)(1).[17] Accordingly, Chevron's interpretation of the upset defense is unconvincing.

"[T]he Clean Water Act recognizes neither a good faith nor a de minimis defense." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1083 (D.N.J. 1990). Instead, courts determine whether a permittee has violated that statute by applying strict liability principles and examining the text of that statute. *See, e.g., Menzel v. County Utils. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983). Similarly, one should interpret the upset defense according to that term's plain meaning. *Cf., e.g., Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 630 (D. Md. 1987). Either the defendant satisfies the conditions of the upset defense or that defendant cannot rely on the upset defense. *See* §§ 122.41(n)(1), 122(n)(3)(i)-(iv).

Accepting Chevron's argument regarding ninety-nine percent compliance would ignore the

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[17] Dr. Tischler conceded as much at trial. *See* Tr. at 579-84.

plain meaning of the upset provision. The paucity of Chevron's post-complaint TSS violations does not, by itself, mean that each of these violations qualifies as an upset. *See* §§ 122.41(n)(1), 122(n)(3)(i)-(iv). Moreover, Chevron's interpretation of the upset defense is unsupported by Fifth Circuit precedent. Consequently, this argument is unpersuasive. Chevron is liable for three post-complaint TSS violations and for sixty-two pre-complaint TSS violations.

IV.

Chevron notes, correctly, that it has not violated the TSS limitations in its NPDES permit for several years. Moreover, Chevron argues that the 1996 TSS limitations will help ensure that future permit violations will not occur. Consequently, Chevron claims that this lawsuit is moot.

The burden to prove mootness is on the party claiming that a case has become moot. *Laidlaw Envtl. Servs, Inc.*, 528 U.S. at 189. This burden is quite a heavy one. *Id.* "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Id.* at 174. Rather, a case is moot only if subsequent events have made it absolutely clear that permit violations "could not reasonably be expected to recur." *Id.* at 193 (citation omitted).

As Plaintiffs note, Chevron violated its TSS limitations in September 1997, just one year after its new TSS limitations were adopted. This TSS violation, for reasons previously explained, is not an upset. Moreover, the court has found that Chevron designed the wastewater treatment facility at the Orange Plant improperly. Thus, Chevron has not established that it is absolutely clear that its permit violations could not reasonably be expected to recur. Chevron's compliance over the last several years does not demonstrate that this case is moot.

V.

The court has found that Chevron is liable for sixty-five violations of the TSS limitations in

its NPDES permit.[18] Accordingly, the court will contact counsel for both sides in the near future to schedule a hearing. At that hearing, the court will determine Friends of the Earth's remedies, such as civil penalties, attorney fees, costs, and injunctive relief.

It is so ORDERED.

Signed this the twentieth day of July, 2004.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

[18] The court previously denied Plaintiffs' motion for reconsideration of its ruling that Chevron's pH violations are barred. Thus, Chevron is not liable for any pH violations.

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FROM: Carolyn Smith Pravlik, Counsel Friends of the Earth

DATE: 9/22/06

ATTACHMENT: District Court, Findings of Fact and Conclusions of La

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MESSAGE: Please Find Request for Contested Case Hearing.

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September 22, 2006

VIA FACSIMILE AND OVERNIGHT MAIL

LaDonna Castanuela
Texas Commission on Environmental Quality
MC-105
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Austin, TX 78711-2087

Re: Request for Contested Case Hearing
Granting of TPDES Permit
Chevron Phillips Chemical Company LP
TPDES Permit No. WQ0000359000 (TX 0004839)

Dear Ms. Castanuela:

Friends of the Earth, through its counsel, Terris, Pravlik & Millian, LLP, requests a contested case hearing regarding the decision to amend TPDES permit number WQ0000359000. On August 23, 2006, the Executive Director of TCEQ issued a decision approving the application made by Chevron Phillips Chemical Company LP ("CPCC") for a major amendment to CPCC's TPDES permit for the Orange Plant.[1/] The amended permit relaxes the amount of total suspended solids ("TSS") that CPCC is allowed to discharge.

Friends of the Earth objects to the relaxation of the TSS limits in CPCC's TPDES permit. Friends of the Earth has standing to challenge the decision to approve the permit because Friends of the Earth is an "affected person" under 30 TAC § 55.201. Friends of the Earth therefore timely files this request for a contested case hearing in opposition to the approval of CPCC's application for an amended permit, in compliance with 30 TAC §§ 55.201, .203, .205, .209, and .211, as set forth below.

[1/]The major amendment was approved in conjunction with the reissuance of the permit.

A. FRIENDS OF THE EARTH'S REQUEST FOR A CONTESTED CASE HEARING IS BASED ON ISSUES TIMELY RAISED DURING THE COMMENT PERIOD

The request of Friends of the Earth ("FOE") for a contested case hearing is based on issues timely raised during the comment period. TCEQ published the notice of application for this permit, along with a draft permit and preliminary decision, on May 22, 2006. FOE filed comments on the draft permit and the preliminary decision on June 20, 2006. These comments were timely filed, as stated in the Executive Director's Response to Public Comment. FOE's comments set forth specific objections to the backsliding in the TSS limit proposed by the draft permit. FOE's comments raised a legal objection to the relaxing of the TSS limit under the anti-backsliding rule and challenged the factual premises for the proposed relaxation. FOE's request for a contested case hearing is based on these legal and factual challenges.

B. FRIENDS OF THE EARTH'S REQUEST FOR A CONTESTED CASE HEARING IS BEING TIMELY SUBMITTED

FOE's request for a contested case hearing is being timely submitted within 30 days of the date of the Decision of the Executive Director. Under 30 TAC § 55.201(a), a request for a contested case hearing must be filed "no later than 30 days after the chief clerk mails * * * the executive director's decision." While the Decision of the Executive Director does not state the date on which it was mailed, it is dated August 23, 2006. This request for a contested case hearing is being filed within 30 days of August 23, 2006.

C. FRIENDS OF THE EARTH MEETS THE REQUIREMENTS FOR A REQUEST FOR A CONTESTED CASE HEARING BY AN ASSOCIATION

FOE meets all of the requirements for standing as an association whose members are "affected persons" under 30 TAC §§ 55.201, .203, and .205. As a result of CPCC's TSS discharges, the individual members of Friends of the Earth suffer injuries in fact to their aesthetic and recreational interests that are not common to the general public, as discussed below.

1. The U.S. District Court for the Eastern District of Texas Has Found That Friends of the Earth Meets the Associational Standing Requirements to Oppose CPCC's Excess Discharge of TSS from the Orange Plant

FOE filed a citizen suit in 1994 under Section 505 of the Clean Water Act against Chevron Chemical Company, which, following a merger, changed its name to Chevron Phillips Chemical Co. The suit, which is still pending, focuses on CPCC's violation of the TSS limit in the permit. *Friends of the Earth v. Chevron Chemical Co.*, E.D. Tex, Civ. Nos. 1:94CV434, 1:94CV580. CPCC challenged FOE's standing to bring the action, "vociferously" arguing that the individual members

of Friends of the Earth would not have standing to sue individually. Findings of Fact and Conclusions of Law (attached as Exhibit 1), p. 4. On July 20, 2004, the Court rejected this challenge in its Findings of Fact and Conclusions of Law. After conducting a thorough factual and legal analysis, the Court held that FOE has standing to bring the citizen suit on behalf of its members.

The Court's ruling that FOE has standing in its lawsuit against CPCC demonstrates that FOE is an "affected person" for the purpose of requesting a contested case hearing before the TCEQ. The Court's Findings of Fact and Conclusions of Law addressed the same issues concerning the discharge of the same pollutant, at the same location, as are involved in FOE's challenge to CPCC's current permit application. FOE incorporates herein the Court's Findings of Fact and Conclusions of Law ("Findings and Conclusions") for purposes of establishing that it has standing to request a contested case hearing.

2. The Proposed Increase in TSS Discharges Will Adversely Affect the Waters that Are Used by Friends of the Earth's Members for Recreation and Aesthetics

As the District Court found, "[i]t is undisputed that TSS makes water dirty and opaque" and "adversely affect[s] fish populations as well as water quality." Findings and Conclusions, p. 9. The increase in TSS discharges contemplated by the amended permit will further harm the quality, clarity, and aquatic life of the receiving waters. The members of FOE who use those waters for aesthetic and recreational purposes will therefore be specifically and directly harmed by the proposed increase in TSS discharges.

3. Since the Members of Friends of the Earth Suffer Specific Injuries-in-Fact from CPCC's TSS Discharges that Are Not Common to the General Public, They Would Have Standing to Request a Contested Case Hearing as Individuals

The Court found, and we presently allege, that four members of FOE, Delaine Sweat, Margaret Green, Opal Fruge, and Rodney Crowl, have suffered injuries in fact from CPCC's TSS discharges at the Orange Plant. Findings and Conclusions, pp. 4-6. CPCC's TSS discharge reaches Sabine Lake, "only about four miles [away] at most" from the Orange Plant, a distance "well within the range" of distances found by courts to confer standing. *See* Findings and Conclusions, p 8. FOE's members have a legal right to use the natural resource of Sabine Lake, and to enjoy and recreate there.

FOE member Delaine Sweat previously walked, drove along, and fished in Sabine Lake, but stopped doing so because the water appeared polluted. Margaret Green fished and boated in Sabine Lake, but will not do so routinely because of the reduced aesthetic beauty of Sabine Lake. Opal Fruge no longer boats and fishes on Sabine Lake because of the water's appearance and condition. Rodney Crowl stopped visiting Sabine Pass to eat seafood because he was concerned about the

condition of the fish caught in Sabine Lake. The Court found, and we allege, that these members of FOE have legitimate aesthetic and recreational interests in the natural resource of Sabine Lake and that CPCC's TSS discharges at the Orange Plant adversely affect these interests by damaging the water quality of Sabine Lake. The Court concluded, and we allege, that these members have suffered injury in fact from CPCC's TSS discharges.

The legal right of FOE's members to use the natural resource of Sabine Lake, and to enjoy and recreate at Sabine Lake, will be adversely affected by CPCC's application. FOE's members have a justiciable interest in enforcing the Clean Water Act and regulations under the Act, specifically the anti-backsliding rule in 40 C.F.R. 122.44(1).

The members of FOE identified above suffer specific injuries-in-fact to their aesthetic and recreational interests that are not common to the general public. While the general public will be harmed if CPCC backslides and causes more water pollution, the members of FOE will be uniquely and particularly harmed because they specifically seek to enjoy Sabine Lake for recreation and aesthetics, and the actual recreational and aesthetic benefits that they have specifically enjoyed at Sabine Lake will be further damaged by increased TSS discharges.

Moreover, FOE and its members are adversely affected by the increase in the TSS limit in terms of the relief that they seek in their pending lawsuit. The suit seeks injunctive and civil penalty relief to enforce the TSS limit. Obviously, relaxation of the limit negatively impacts the relief they might obtain.

4. Friends of the Earth Meets the Other Requirements for a Request for a Contested Case Hearing by a Group or Association

In addition to finding that the members of FOE would have standing to sue CPCC for its TSS discharges as individuals (a finding which satisfies the requirements of 30 TAC § 55.205(a)(1)), the Court further concluded that the interests FOE sought to protect by opposing CPCC's TSS discharges in the lawsuit were germane to its purpose as an organization. Findings and Conclusions, p. 4. FOE has promoted a broad agenda of environmental awareness and improvement for years. Accordingly, the interests that FOE seeks to protect by opposing the proposed backsliding of CPCC's TSS limits are germane to the pursuit of environmental improvement that is the reason for FOE's existence. FOE's request for a contested case hearing therefore meets the requirements of 30 TAC § 55.205(a)(2).

The Court found that there was no need for FOE's members to participate in the civil lawsuit. Findings and Conclusions, p. 4. Similarly, neither the claim asserted nor the relief requested in FOE's request for a contested case hearing requires the participation of the individual

members of FOE. FOE's request for a contested case hearing therefore meets the requirements 30 TAC § 55.205(a)(3).

Due to their volume, FOE has not attached the testimony and other materials from the District Court case upon which standing was established. If requested, FOE will provide these materials.

D. SUMMARY OF DISPUTED FACTUAL AND LEGAL ISSUES

Under 40 C.F.R. 122.44(l), a reissued or renewed permit must have effluent limits, standards, and conditions that are at least as stringent as the previous permit, with very narrow exceptions. As EPA described this long-standing requirement when it adopted the exceptions to it in 1984 (49 Fed. Reg. 38019 (Sept. 26, 1984)):

> This provision prohibited the reissuance of an NPDES permit with limitations, standards, and conditions less stringent than those in the previous permit unless the circumstances on which the previous permit had been issued had materially and substantially changed and constituted cause for permit modification or revocation.

This provision, which is referred to as the anti-backsliding rule, prohibits TCEQ from issuing a permit for this facility that is less stringent unless the cause exception is satisfied. FOE contends that the cause exception has not been satisfied.

FOE disputes that the backsliding of CPCC's TSS limit satisfies the "material and substantial change" exception to the anti-backsliding rule. FOE's objection to the backsliding involves several different disputes of law, fact, and the application of law to facts, all of which were raised in FOE's comments. The discussion below is meant merely to list the disputed issues of law and fact for the purpose of compliance with 30 TAC § 55.201(d)(4). FOE requests a contested case hearing so that it may provide full legal briefing and evidentiary support for all the disputed issues summarized below.

1. Disputed Issues of Law

a. Backsliding Cannot Be Justified when the Applicant's Treatment Facilities Are Inadequate or when the Applicant Fails to Follow Rudimentary Best Management Practices

FOE's first comment raised the legal argument that the "material and substantial change" exception to the anti-backsliding rule may not be used when the applicant's treatment facilities are

inadequate. The Executive Director's Response to FOE's first comment did not address this legal argument. FOE continues to assert this legal objection to the decision to relax CPCC's TSS limit.

FOE's sixth comment similarly raised the legal argument that the "material and substantial change" exception to the backsliding rule may not be used when the applicant has failed to follow rudimentary best management practices (BMP). The Executive Director's Response to FOE's sixth comment observed that the applicant may use a variety of BMP's to meet required effluent limits, but did not squarely address the argument that backsliding may not be allowed for an applicant who fails to follow rudimentary BMP's. FOE continues to assert this legal objection.

b. The Change that Is Cited as Justifying Backsliding Must Actually Make It More Difficult for the Permitholder to Meet Current Discharge Limits in Order to Qualify for the Exception to the Anti-backsliding Rule

CPCC claims that "a major change that has occurred at the Orange Plant that justifies an exemption from the anti-backsliding provisions is the permanent shutdown and demolition of the LDPE plant, boiler house and the pilot plant." *See* Letter from CPCC to TCEQ referencing TCEQ's proposal to deny CPCC's request for an increase in its TSS permit limits (hereafter "CPCC Comment Letter"), p. 2. CPCC further claims that "[s]torm water from these areas will contain TSS concentrations that are typical of sites where 'industrial activities' are conducted, and TSS limits at Outfall 001 should account for these changed operations at the Orange Plant." CPCC Comment Letter, p. 2. CPCC contends that these changes "constitute a 'material and substantial altteration' of the Orange Plant and therefore should exempt the requested TSS increase from the anti-backsliding provisions as provided at 40 C.F.R. 122.41(1)(2)(i)(A)." CPCC Comment Letter, p. 2. The Executive Director appears to have relied upon these claims by CPCC.

In fact, none of these changes increase the TSS concentration in the storm water discharged through Outfall 001. The changes are either neutral or reduce the TSS.

Prior to its shutdown and demolition, the LDPE plant constituted an impervious, concrete surface for storm water runoff purposes. Following its demolition, the area was converted from concrete to grass. Permit Application, Attachment 9. Grass surfaces, of course, produce less flow and fewer solids than concrete surfaces. Indeed, the area was more "urbanized" before LDPE was removed than after. Therefore, the demolition of the LDPE plant justifies a reduction in the TSS limit, not an increase.

Nevertheless, the Executive Director, in Response 3, stated that the reason for the relaxation of CPCC's TSS limits is a change of categorization of the storm water runoff from this area. Previously, the storm water was characterized as wastewater from facilities producing organic

chemicals, plastics, and/or synthetic fibers and therefore covered by the Organic Chemical, Plastics and Synthetic Fibers (OCPSF) guidelines (40 C.F.R. Part 414).

Now that several structures at the Orange Plant have been removed, the storm water has been characterized as non-process storm water that "is not subject to federal effluent guidelines and any technology-based effluent limits are based on best professional judgement [sic]." Fact Sheet and Executive Director's Preliminary Decision, p. 7. There is no justification for using best professional judgment ("BPJ") to relax this limit.[2/] BPJ dictates that, where the changed circumstances will make compliance with the existing permit limit easier, the permit limit not be relaxed. Thus, in an analogous situation, the backsliding rule prohibits relaxation of a BPJ-based limit in the face of a later-established effluent guideline limit that is less stringent. 40 C.F.R. 122.44(l)(2). The Executive Director has failed to demonstrate that the changes to the CPCC facility made it harder for CPCC to meet its TSS limit by producing more flow or solids than can be handled by adequate treatment facilities.

The Executive Director's Response 3 implicitly stated that a change in the technical, categorical classification of the storm water can suffice to meet the "material and substantial change" exception to the anti-backsliding rule, even where there is no relationship between the change to the facility and the discharges from that facility. The changes to the CPCC facility do not make it harder for CPCC to meet its current TSS limit -- in fact, they make it easier for CPCC to comply. Nonetheless, the Executive Director appears to assert that the changes can justify increasing the TSS limit.

c. An Applicant's Treatment and Control Facilities Must Be Considered in Determining whether the Applicant Meets the Exception to the Anti-backsliding Rule

The other changes upon which CPCC based it claim of a material change is the demolition of the pilot plant and the boiler house. However, each of these changes represents a neutral change from the standpoint of storm water. The pilot plant is located in an area of the plant that during storm events is tributary to the rice gates. CPCC's standard operating procedure is to close the rice gates during storm events. The effect of this is that all storm water in the area tributary to the rice gates is held back from the WTP during storm events.[3/] Following the storm event, the rice gates are opened and the water is bled into the WTP. Accordingly, the rice gates serve, in effect, as a storm water surge tank. During a storm event, none of the storm water runoff from the pilot plant area ever

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[2/] In his response to comments, the Executive Director stated that the limits are based on the Multi-Sector General Permit. Response 3. He apparently meant that BPJ was relied on.

[3/] CPCC admitted during the course of the litigation that the rice gates have never been overtopped.

reaches the WTP. Consequently, this storm water does not affect the level of TSS in the discharge during a storm event.[4/]

The boiler house, like the LDPE area, is in an area that is not tributary to the rice gates. Nevertheless, its demolition also represents a neutral change in terms of storm water flows and TSS loads in that storm water. Both before and after demolition, the boiler house constituted an impervious, concrete surface. Therefore, the storm water flows and TSS load in the storm water from this area remains the same. Furthermore, the steam that is now purchased as a substitute for the steam generated by the old boiler house is "condensed after exiting the process and drained to the fire pond, which drains to the wastewater treatment system." Permit Application, Attachment 9. The fire pond is in the area of the plant that is tributary to the rice gates. Therefore, this steam condensate does not reach the WTP during a storm event.

FOE commented that the rice gates at the facility prevent any potential excess storm runoff arising from the demolition of the pilot plant and the boiler house from actually affecting the TSS discharges at the Orange Plant during storm events.[5/] The Executive Director's Response 3 and Response 5 do not dispute this factual observation. However, in Response 5 the Executive Director argued that, since CPCC's decision to use the rice gates is optional and cannot be required by the TPDES permit, it cannot be considered in calculating the permit limitations.

As noted above, the Executive Director stated that the basis for the relaxed TSS limit is best professional judgment. Best professional judgment requires consideration of the treatment and management practices employed at the facility. While the Executive Director is correct that the

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[4/]We note that this is not the first instance where CPCC has misrepresented facts about its stormwater flows to TCEQ. On August 3, 1994, in response to an Administrative Order that was issued by EPA for CPCC's TSS violations, CPCC wrote to EPA detailing the interim measures it would take. FOE Comments, Enclosure 3. On August 23, 1994, CPCC sent almost the same letter to TNRCC, which is now TCEQ. *Id.*, Enclosure 4. CPCC identified a stormwater surge tank as one of the interim measures that it was using as a storm surge control and stated that "[t]his system is now capable of retaining 2.2 million gallons." Enclosure 3, p. 2; Enclosure 4, p. 2. CPCC failed to mention that the surge tank would only retain stormwater already retained by the rice gate. CPCC admitted that the tank accomplish nothing more than was already accomplished by the rice gates during FOE's pending case.

Although CPCC mentions the rice gates in Attachment 1 to its permit application, it does not reveal the fact that the storm and process waters collected in the rice-gated area do not reach the WTP during storm events and are therefore irrelevant to an assessment of the appropriate TSS limit for the stormwater fraction of the discharge.

[5/]Compliance with the TSS limit is only an issue during storm events.

permit cannot include a requirement that the rice gates be employed, the Executive Director is incorrect to the extent that he indicated that use of the rice gates cannot be considered in establishing a permit limit based on best professional judgment. Indeed, consideration of treatment and other control facilities is mandatory in establishing a BPJ-based effluent limit. 40 C.F.R. 125.3(d).[6/]

d. The Effect of Backsliding on Aquatic Life Uses Must Be Considered in Determining whether Backsliding Is Justified

FOE's seventh comment stated that the negative impact of increased TSS discharges on aquatic life is a factor weighing against a finding that the backsliding is justified. The Executive Director's Response 7 stated that the high aquatic life use of the receiving water had no impact on his Decision. Response 7 therefore implied that the Executive Director need not consider the negative impact of backsliding on aquatic life in deciding whether an exception to the anti-backsliding rule is justified. FOE contends that the impact on water quality must always be considered in establishing permit limits, including limits that involve backsliding.[7/]

2. Disputed Issues of Relevant and Material Fact

a. CPCC's Treatment Facilities and Procedures Are Inadequate

FOE's first comment, as explained in greater detail in its third comment, raised the factual issue of the adequacy of CPCC's treatment facilities and stated that CPCC's treatment facilities are inadequate as found by the district court (*see* Findings and Conclusions, pp 13-16). FOE made related factual assertions in several of its other comments. Comment 2 stated that CPCC's maintenance of its Cube Pond treatment facility is inadequate, because it has allowed solids to accumulate in the pond, and these solids are scoured out during heavy rainfall and contribute to TSS discharges. Comment 6 stated that CPCC has failed to institute adequate control measures to stabilize materials that would contribute solids to the discharge during a storm event. FOE also stated that CPCC's failure to institute adequate control measures constitutes a failure to follow a rudimentary best management practice.

[6/]We note that Friends of the Earth did not have the opportunity to assert this argument in its Comments. The Executive Director made this legal interpretation of the anti-backsliding rule in the Response to Public Comment after comments had been submitted.

[7/]We note that Friends of the Earth did not have the opportunity to assert this argument in its Comments. The Executive Director made this interpretation of the anti-backsliding rule in the Response to Public Comment after comments had been submitted.

The Executive Director replied in Response 1 and Response 2 that CPCC's treatment facilities have a record that "demonstrates general compliance with the specified limitations for TSS on a year round basis." This statement seems to imply a disagreement with FOE's factual assertions about the adequacy of CPCC's treatment facility. This factual disagreement is relevant and material because FOE's factual assertion, when joined with the legal argument in its first comment that backsliding may not be permitted when treatment facilities are inadequate, would preclude the permit's backsliding.

Furthermore, the Executive Director's conclusion that the treatment facilities provide for compliance with the TSS limit is directly inconsistent with his conclusion that relaxation of the TSS limit is justified under the anti-backsliding rule. If the treatment facilities provide for compliance, there is no justification for relaxing the limit.

b. The Changes to the CPCC Facility Will Decrease, Rather than Increase, the Amount of Storm Runoff and Waste Solids

The Fact Sheet and Executive Director's Preliminary Decision ("Preliminary Decision"), page 21, stated that since changes in the CPCC facility have "resulted in an increase of storm water runoff from uncovered/unpaved areas," the relaxed TSS limit is justified. As discussed above (pp. 5-7), FOE disputes this factual assertion.

The Preliminary Decision also stated that the changes at the CPCC facility will have "a significant impact on the quality of the discharge with respect to total suspended solids." FOE likewise disputes this factual assertion in its third and fourth comments, on the ground that the change from impervious concrete to grass should actually produce less TSS, not more. Moreover, the demolition of the LPDE plant should reduce the TSS in CPCC's discharge, rather than increasing it, because the closure of the LPDE plant eliminates a significant source of the wastewater stream, thereby leaving more capacity in the treatment facilities for the treatment of storm water at the Orange Plant.

The Executive Director's Response 3, Response 4, and Response 5 do not directly contradict these facts. Indeed, the Executive Director seems to concede FOE's factual statements, saying in Response 4 that "[t]he change in contributing waste stream flows had minimal influence on the calculation of the TSS limits" and citing a change in the categorization of the waste stream flows as the primary reason for the change in TSS levels. However, the explanation given for the backsliding in the Executive Director's Preliminary Decision relies on CPCC's claims regarding the changes. In addition, the Executive Director's Response 1 repeated the assertion that the changes at the facility have increased storm runoff and affected the discharge of TSS. These disputed factual assertions are relevant and material because they are essential to determining whether the changes at the CPCC facility justify backsliding with regard to the TSS limit.

3. Disputed Issue of the Application of Law to Fact

Each of FOE's comments disputes the application of the law of the "material and substantial change" exception in the anti-backsliding rule to the facts regarding the changes at the Orange Plant.

E. CONTACT INFORMATION

Carolyn Smith Pravlik, counsel for FOE, is responsible for receiving all communications and documents for the group pursuant to 30 TAC § 55.201(d)(1). Her contact information is as follows:

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We appreciate your consideration of our request for a contested case hearing. Please do not hesitate to contact me if you have any questions regarding our request.

Sincerely,

Carolyn Smith Pravlik
Counsel for Friends of the Earth

Enclosure 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FRIENDS OF THE EARTH, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 1:94-CV-434
	§	Case No. 1:94-CV-580
CHEVRON CHEMICAL COMPANY,	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Plaintiff Friends of the Earth, Inc. ("Friends of the Earth") is a non-profit corporation organized under the laws of the District of Columbia. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 827 (5th Cir. 1997). For years, Friends of the Earth has "promote[d] a broad agenda of environmental awareness and improvement projects." *Id.* Friends of the Earth has sought to implement this agenda, in part, through lawsuits filed in district courts, including this one. *Id.* at 827 & n.1.

Defendant Chevron Chemical Company ("Chevron") manufactures polyethylene at its plant in Orange, Texas ("the Orange Plant"). *Id.* at 827. Under its National Pollution Discharge Elimination System ("NPDES") permit, Chevron discharges process water and storm water from the Orange Plant into Round Bunch Gully, which flows into Cow Bayou, and then to the Sabine River and into Sabine Lake. *Id.* Chevron's NPDES permit limits the amount of total suspended solids ("TSS")[1] that Chevron may discharge. *Id.* "Between October 1990 and January 1994, Chevron

[1] TSS is comprised of dirt, polyethylene particles, and biological solids. Tr. at 72, 74.

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exceeded its TSS limits." *Id.*

Friends of the Earth eventually learned of these developments. *See id.* The organization filed a private civil enforcement lawsuit in July 1994 against Chevron under the Federal Water Pollution Control Act, 33 U.S.C. §1365 (1994) ("the Clean Water Act"). *Id.*[2] Friends of the Earth alleged that Chevron had committed numerous violations of its NPDES permit. *Id.* After its lawsuit was filed, Friends of the Earth filed a second lawsuit alleging additional permit violations by Chevron. *Id.* This court consolidated both cases. *Id.*

Both Friends of the Earth and Chevron filed motions for summary judgment. The court denied Friends of the Earth's motion for summary judgment and granted in part and denied in part Chevron's motion for summary judgment. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 83-84 (E.D. Tex. 1995). Notably, the court found that a genuine issue of material fact existed regarding Friends of the Earth's TSS claims. *Id.* at 83. The court, however, concluded that Chevron was entitled to summary judgment on Friends of the Earth's other claims. *Id.* at 83-84. The court found that Friends of the Earth's claim for injunctive relief and its claim for civil penalties were not moot. *Id.* at 84. Finally, the court concluded that Friends of the Earth had constitutional standing to bring this lawsuit. *Id.* at 74-77.[3]

The court held a three-day bench trial in January 1996. During that trial, Friends of the Earth presented four witnesses on the issue of constitutional standing: Delaine Sweat, Margaret Green, Opal Fruge, and Rodney Crowl. Tr. at 32-67. Friends of the Earth also presented Dr. Bruce Bell as

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[2] Chevron first gave the Environmental Protection Agency ("EPA") the required sixty days notice. *Id.*

[3] The court later entered an order saying that standing would be an issue for trial because a fact issue remained concerning standing.

[standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted).

An organization such as Friends of the Earth has standing to bring a civil action on behalf of its members if "(1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 555 (5th Cir. 1996) (citations omitted). Here, Chevron does not dispute that Friends of the Earth has met the last two prongs of this test. Instead, Chevron claims the court should dismiss this lawsuit because Friends of the Earth's members would not have standing to sue individually.

In order to have standing to sue individually, a member of an organization must meet three requirements. Specifically, a member "must show that: (1) he has suffered an actual or threatened injury as a result of the actions of the defendant; (2) the injury is 'fairly traceable' to the defendant's actions; and (3) the injury will likely be redressed if he prevails in his lawsuit." *Id.* at 556 (citations omitted); *see also Save Our Community*, 971 F.2d at 1160. Chevron vociferously argues that Friends of the Earth's members meet none of these three requirements. The court consequently examines whether Friends of the Earth's members meet each of these requirements.

A.

To establish individual standing, a party must show that it has suffered injury in fact. *See, e.g., Friends of the Earth, Inc v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 187 (2000). As the Fifth Circuit has observed, "the threshold for the injury requirement is fairly low." *Sierra Club, Lone Star Chapter*, 73 F.3d at 557 n.23 (citations omitted). Because a party's "injuries need not be large, an 'identifiable trifle' will suffice." *Pub. Interest Research Group of N.J., Inc v. Powell*

Here, as in *Laidlaw*, Friends of the Earth's members have legitimate recreational and aesthetic interests. *See* Tr. at 32-67. Each of Friends of the Earth's members who testified at trial complained that their recreational activities have been adversely affected. *See id.* Notably, Delaine Sweat testified that she previously walked, drove along, and fished in Sabine Lake, but stopped doing so because the water appeared cloudy and polluted. *Id.* at 44-48. Margaret Green testified that she had fished and boated in Sabine Lake, but would not do so consistently due to the reduced aesthetic beauty of Sabine Lake. Tr. at 60-62. Opal Fruge testified that she no longer boats and fishes on Sabine Lake because of the water's appearance and condition. *Id.* at 34-36. Finally, Rodney Crowl testified that he had visited Sabine Pass to eat seafood, but stopped doing so because he was concerned about the quality and condition of fish caught in Lake Sabine. *Id.* at 56.

It is well settled that harm to aesthetic, environmental, or recreational interests constitutes an injury in fact. *See, e.g., Laidlaw*, 528 U.S. at 183-84; *Morton*, 405 U.S. at 734-35. The injuries asserted by Friends of the Earth's members in *Laidlaw* are similar to the injuries asserted by Friends of the Earth's members in this case. *Compare Laidlaw*, 528 U.S. at 183-84, *with* Tr. at 32-67. Friends of the Earth's members have sufficiently demonstrated that Chevron's TSS discharges adversely affected their recreational interests. Consequently, Friends of the Earth's members have suffered injuries in fact. *Id.*; *see also Sierra Club, Lone Star Chapter*, 73 F.3d at 556-57.

B.

The second requirement for individual standing is that the injuries suffered by an individual must be "fairly traceable" to the defendant's permit violations. *See, e.g., Sierra Club, Lone Star Chapter*, 73 F.3d at 557. Like the requirement of injury in fact, this requirement is not a demanding one. *See, e.g., Save Our Community*, 971 F.2d at 1161. Indeed, "[t]he requirement that plaintiff's

injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that [the] defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72; *see also Save Our Community*, 971 F.2d at 1161. Nor must plaintiffs "pinpoint[] the origins of particular molecules" in order to satisfy this requirement. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc).

Instead, a plaintiff satisfies this requirement by showing that a defendant has

> 1) discharged some pollutant in concentrations greater than allowed by its permit
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that
> 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Powell Duffryn Terminals, Inc., 913 F.2d at 72 (footnote omitted). This test has been applied in Clean Water Act cases by the Fifth Circuit. *Sierra Club, Lone Star Chapter*, 73 F.3d at 557. Accordingly, the court examines whether Friends of the Earth's witnesses satisfy the *Powell Duffryn* test.

1.

Regarding the first prong of the *Powell Duffryn* test, Chevron violated the TSS limitations in its NPDES permit sixty-five times. *See* Pl.'s Ex. 8 (Trial–Jan. 17, 1996). Consequently, Chevron has discharged TSS at levels greater than allowed by its NPDES permit. Thus, Friends of the Earth's members have satisfied the first prong of the *Powell Duffryn* test.

2.

Regarding the second prong of the *Powell Duffryn* test, Chevron avers that it does not discharge TSS into a waterway in which Friends of the Earth's members have an interest that is or

may be adversely affected. At trial, Friends of the Earth's witnesses complained mainly about pollution in Sabine Lake. *See, e.g.*, Tr. at 32-33, 43, 55, 59-60. Chevron points out that it does not discharge TSS directly into Sabine Lake. *See* Def.'s Exs. K, L. Instead, Chevron's TSS discharge flows into Round Bunch Gully, then into Cow Bayou, and then into the Sabine River, which empties into Sabine Lake. Def.'s Ex. L. Thus, there are intermediate bodies of water between the Orange Plant and Sabine Lake. *See id.*

Although the Orange Plant is not situated on the shore of Sabine Lake, the distance between these two locations is only about four miles at most. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 75 (E.D. Tex. 1995). Contrary to what Chevron implies, there is no "mileage or tributary limit for plaintiffs proceeding under the citizen suit provision of the CWA." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996). Moreover, the distance between the Orange Plant and Sabine Lake is well within the range of distances in cases where courts have found the "fairly traceable" requirement to have been satisfied. *Compare Chevron Chem. Co.* 900 F. Supp at 75, *with Laidlaw Envtl. Servs.*, 528 U.S. at 181-84, *and Gaston Copper Recycling Corp.*, 204 F.3d at 161-62.

Here, Chevron has discharged TSS that, eventually, reached Sabine Lake. Friends of the Earth's members recreate in, on, near, and around Sabine Lake. Tr. at 32-33, 43, 55, 59-60. Because their recreational interests have been adversely affected by Chevron's TSS discharges, Friends of the Earth's members have satisfied the second prong of the *Powell Duffryn* test.[5]

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[5] Admittedly, the Fifth Circuit once noted, in *dictum*, that "some 'waterways' covered by the CWA may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing." *Sierra Club, Lone Star Chapter*, 73 F.3d at 558 n.24 (citations omitted). Soon after *Sierra Club*, the Fifth Circuit in *Crown Central Petroleum* found that the plaintiffs had not satisfied the "fairly

Regarding the third prong of the *Powell Duffryn* test, the court finds that Chevron's TSS discharge contributed to the kinds of injuries alleged by Friends of the Earth's members. Friends of the Earth's members testified at trial that Sabine Lake and the Gulf of Mexico appeared both murky and polluted. Tr. at 35, 45, 61. Moreover, Friends of the Earth's members claimed that their recreational interests in, on, and near Sabine Lake have been negatively affected by the appearance of the water in Sabine Lake. *Id.* at 32-33, 43, 55, 59-60.

It is undisputed that TSS makes water appear dirty and opaque. *Id.* at 74. Moreover, high levels of TSS adversely affect fish populations as well as the quality of water. *Id.* Chevron previously discharged TSS in quantities that exceeded its permit limitations. Moreover, Chevron's TSS discharge eventually reached Sabine Lake. Because its TSS discharge adversely affected a body of water in which Friends of the Earth's members have recreational interests, Chevron contributed to the recreational injuries that Friends of the Earth's members suffered. *See Powell Duffryn*

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traceable" requirement because the refinery at issue was eighteen miles from the body of water used by plaintiffs. 95 F.3d at 361-62. Relying on *dictum* in *Sierra Club* and on the holding of *Crown Central Petroleum*, Chevron contends that the distance between the Orange Plant and Sabine Lake is too vast for the court to find that Friends of the Earth's members have met the "fairly traceable" requirement.

Here, however, the distance between the Orange Plant and Sabine Lake is far less than the relevant distance in *Crown Central Petroleum*. *Id.* at 361. Friends of the Earth has shown and the court has concluded that Chevron's TSS discharge eventually flows into Sabine Lake. Additionally, Friends of the Earth has shown that its members have legitimate recreational interests in Sabine Lake. Consequently, *Crown Central Petroleum* is inapposite. Although Friends of the Earth's interest in Galveston Bay in *Crown Central Petroleum* "passe[d] Article III bounds," *id.*, Friends of the Earth's interest in Sabine Lake in this lawsuit is within Article III bounds.

Terminals, Inc., 913 F.2d at 72.[6]

C.

The final requirement for individual standing is redressability, which means that a plaintiff's injuries are "likely to be redressed by a favorable [judicial] decision." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quotation & footnote omitted). This requirement concerns "the connection between the plaintiff's injury and the judicial relief sought." *Save Our Comm.*, 971 F.2d at 1161 (citation omitted). The possibility that the relief sought will redress a plaintiff's injuries must be not merely speculative, but likely. *See Laidlaw Envtl. Servs, Inc.*, 528 U.S. at 187.

Here, Friends of the Earth, on behalf of its members, seeks an award of civil penalties from Chevron. Although civil penalties are paid to the United States Treasury and not given to a successful plaintiff, the deterrent effect of an award of civil penalties on a defendant serves "[t]he general public interest in clean waterways." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 73. Consequently, it is well settled that if an organization seeks an award of civil penalties on behalf of its members, the redressability requirement is satisfied. *See Laidlaw Envtl. Servs., Inc.*, 528 U.S. at

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[6] Chevron contends that Friends of the Earth's members must demonstrate that Chevron's TSS discharge in particular injured one of Friends of the Earth's members. This argument, however, is untenable under Fifth Circuit precedent. As the Fifth Circuit noted in *Sierra Club, Lone Star Chapter*, a member of an organization only needs to show that the defendant's discharge contributed to the types of recreational injuries alleged by that member. 73 F.3d at 558. A plaintiff need not "show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72; *see also Save Our Comm.*, 971 F.2d at 1161. This argument is unpersuasive.

187.[7]

Such a situation exists in this lawsuit. Because Friends of the Earth seeks an award of civil penalties, the injuries of its members are likely to be redressed by a favorable decision in this case. *See id.* Consequently, the court finds that Friends of the Earth has satisfied the redressability requirement. *Id.*[8]

The court finds that Friends of the Earth's members would have standing to sue Chevron individually. Thus, Friends of the Earth has constitutional standing. The court now considers the question of whether Friends of the Earth has statutory standing.

III.

To establish statutory standing under the Clean Water Act, plaintiffs must allege "a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). The Clean Water Act does not, however, "permit citizen [law]suits for wholly past violations." *Id.* at 64. Thus, a plaintiff must "make a good-faith allegation of continuous or intermittent violation" at the beginning of the lawsuit. *Id.*

The Fifth Circuit has stated that a plaintiff may prove an ongoing violation either

> (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a

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[7] *See also Powell Duffryn Terminals, Inc.*, 913 F.2d at 73; *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695 (4th Cir. 1989); *Pub. Interest Research Group of N.J. v. Star Enter.*, 771 F. Supp. 655, 664 (D.N.J. 1991); *Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1200-02 (D.N.J. 1985).

[8] Chevron contends that Friends of the Earth's claims cannot be redressed by a favorable decision in this lawsuit because this lawsuit is moot. For reasons to be explained, the court finds that this lawsuit is not moot. Thus, this argument is unpersuasive.

> continuing likelihood of recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.

Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991) (quotation omitted). Under the first avenue, proof of post-complaint violations establishes statutory standing. *See id.*[9] Moreover, even proof of a single post-complaint violation conclusively establishes statutory standing. *Id.* at 1065 n.12.

Here, Chevron violated its TSS limitations three times after Friends of the Earth filed its lawsuit. Chevron exceeded its TSS limitations on April 10, 1995, Pl.'s Exs. 8 & 55 (Trial–Jan. 17, 1996), on August 30, 1996, Def.'s Ex. R (Hearing–Oct. 13, 1998), and on September 17, 1997. Def.'s Ex. V (Hearing–Oct. 13, 1998). Chevron has asserted the affirmative defense of upset for each of these TSS violations. *See* 40 C.F.R. § 122.41(n) (2000). The court examines each claim in turn.

A.

Chevron contends that its TSS violation on April 10, 1995 was an upset. An upset is "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." *Id.* § 122.41(n)(1).[10] An upset, if proven, is an affirmative defense to a permit violation. *Id.* § 122.41(n)(2).

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[9] *See also Natural Res. Def. Council, Inc v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 501-02 (3d Cir. 1993); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Inc.*, 844 F.2d 170, 171-72 (4th Cir. 1988) (per curiam).

[10] Chevron's NPDES permit contains an almost identical definition. Pl.'s Ex. 3, Part III(B)(5). Friends of the Earth acknowledges that Chevron's NPDES permit is technology-based.

"[T]he permittee seeking to establish the occurrence of an upset has the burden of proof." *Id.* § 122.41(n)(4). Additionally, the permittee must demonstrate, through relevant evidence, the following:

> (i) An upset occurred and [] the permittee can identify the cause(s) of the upset;
> (ii) The permitted facility was at the time being properly operated; and
> (iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).
> (iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

Id. § 122.41(n)(3)(i)-(iv). A permittee's failure to establish compliance with any of these four requirements prevents that permittee from claiming that an upset occurred. *See id.* § 122.41(n)(3). If the defendant proves each of these four conditions, the court must then evaluate whether the incident at issue qualifies as an upset under section 122.41(1). *See id.* § 122.41(n)(1). Here, Chevron has satisfied all four conditions and thus may assert that upsets occurred.

There are, however, situations in which the upset defense is unavailable to a permittee. *See id.* Specifically, "[a]n upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation." *Id.* If a plaintiff proves that any of these situations existed, the upset defense is inapplicable. *See id.* Here, Friends of the Earth claims, among other things, that Chevron designed its treatment facilities improperly.

In designing a wastewater treatment plant, engineers must ensure that the facility is sufficient to handle the volume of runoff from rainstorms. To do so, engineers must choose a design storm in order to estimate the amount of runoff. The design storm must address two key factors: the total volume of runoff and the rate at which that runoff will occur. Both factors are affected by the

amount of rainfall, the duration of a rainstorm, and the physical characteristics of the wastewater treatment plant. In choosing a design storm, one should do so based on a significant amount of rainfall data. *See* Tr. at 87:22-31.

In correspondence with both the EPA and the TNRCC, Chevron informed both agencies that it had designed the treatment facility at the Orange Plant to handle a five-year, twenty-four hour storm event.[11] A five-year, twenty-four hour storm event is a statistical concept, not an actual storm. Tr. at 87:4. It represents the total rainfall that would result from a storm that occurs once every five years and lasts twenty-four hours. *Id.*; *see also* Pl.'s Ex. 65, p. 12.

Designing a wastewater treatment facility for a five-year, twenty-four hour storm means that the facility is "adequate to handle the total volume and the rate of runoff that would result from a storm that would occur on the average once every five years." *Id.* at 88:4-6. For Orange, Texas, the five-year, twenty-four hour storm will result in 7.3 inches of rain in a day. *Id.* at 88:29-31. In designing the wastewater treatment facility at the Orange Plant, Chevron represented to state and federal agencies that it had met this statistical standard.[12]

The record in this case proves that Chevron failed to meet this standard. Rather, Chevron

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[11] Pl.'s Ex. 55 (Letter of Apr. 20, 1995 from Dale W. Durr to Terry Lane of the EPA, p. 2) ("Our treatment facility was designed to treat a 5 year, 24 hour rainfall event . . . ."); Pl.'s Ex. 16 (Letter of Aug. 23, 1994 from Charles W. Miller to Georgie Volz of the TNRCC, p. 2) ("This system has been designed to hydraulically handle and treat the combined flows of all process waters and a 5 year 24 hour maximum precipitation event . . . .").

[12] *See supra* note 11. Additionally, various Chevron officials intimated during their depositions that Chevron had met this standard. Pl.'s Ex. 63 (Depo Tr. of Jeffrey Downing at 27:8-11) ("We were a little bit over 7 inches. So we were well within the 5-year, 24-hour event classification."); Pl.'s Ex. 9 (Depo. Tr. of Dale Durr at 86:16-18) ("All I am saying is the system was designed to handle a five-year, 24-hour maximum that we have seen. That was the basis for the design.").

selected a rainstorm that occurred on June 1, 1992 as the basis for the design of the wastewater treatment facility at the Orange Plant. Tr. at 89:20-23. Jeffrey Downing, an engineer and former employee at the Orange Plant, claims that Chevron made that choice because "some actual event was needed in order to base a design on." Pl.'s Ex. 63 (Depo. Tr. of Jeffrey Downing at 21:6-7).

Chevron has stated that the June 1992 rainstorm was the most severe rainstorm in the history of the Orange Plant. *Id.* (Depo. Tr. of Jeffrey Downing at 13:10-21); Tr. at 119:4-12. Chevron, however, has no data regarding how much rain fell on the Orange Plant during that storm. *See* Tr. at 90:9-10. Unfortunately, the rain gauge at the Orange Plant was broken. *Id.*

According to data maintained by the National Weather Service, the Jefferson County Airport received 3.35 inches of total rainfall on June 1, 1992. *Id.* at 90:2-6; *see also* Pl.'s Ex. 65, p. 20. Moreover, six and a half inches of rain fell on facilities near the Orange Plant. Tr. at 119:16-29. Thus, the rainfall during the June 1992 storm was less than the rainfall that would result from a five-year, twenty-four hour storm event. *See* Pl.'s Ex. 65, figure 6-3. Chevron's expert, Dr. Lial Tischler, previously acknowledged this disparity. Pl.'s Ex. 64 (Depo. Tr. of Lial F. Tischler at 40:12-14) (stating that "it appears that [the June 1st, 1992 storm] probably was not a five-year-24-hour event but something somewhat less than that").

Dr. Tischler never analyzed whether Chevron designed the wastewater treatment facility at the Orange Plant properly. Tr. at 591. Nor did he initially determine whether the June 1992 storm equaled the five-year, twenty-four hour storm. Pl.'s Ex. 64 (Depo. Tr. of Lial F. Tischler at 40:5-8). He did, however, admit that Chevron did not design the Orange Plant to withstand a five-year, twenty-four storm. *Id.* (Depo. Tr. of Lial F. Tischler at 40:12-14).

The concept of the five-year, twenty-four hour storm is not a required industry standard. Tr.

at 138. It is, however, the standard that Chevron sought to duplicate–yet failed to achieve–in designing the wastewater treatment facility at the Orange Plant. *See, e.g., id.* Thus, Chevron designed that facility improperly.[13] The affirmative defense of upset is inapplicable in this case and unavailable to Chevron. *See* § 122.41(n)(1).[14]

Because Chevron cannot assert the upset defense, Chevron is liable for the TSS violations that occurred on April 10, 1995, on August 30, 1996, and on September 17, 1997. *See id.*[15] Each of these post-complaint TSS violations, standing alone, establishes statutory standing. *See Carr*, 931 F.2d at 1065 n.12 ("[P]roof of an actual violation subsequent to the complaint is conclusive.").[16] Consequently, Friends of the Earth has established statutory standing. *See id.*

Chevron argues that each of its post-complaint TSS violations is an upset because it achieved ninety-nine percent compliance with its TSS limitations. Def.'s Post-Appeal Proposed Findings of

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[13] *Cf.* THE AMERICAN HERITAGE DICTIONARY 349 (1989) (defining the word "improper" to mean "[n]ot suited to needs or circumstances," "unsuitable," and "[n]ot consistent with fact"). Chevron's actual design of the wastewater treatment facility at the Orange Plant is inconsistent with what Chevron told the EPA regarding that facility as well as inconsistent with the five-year, twenty-four hour storm. Thus, the word "improper" aptly describes the Orange Plant's design.

[14] Indeed, as Friends of the Earth's expert, Dr. Bruce Bell, testified, if Chevron had designed the wastewater treatment facility at the Orange Plant to withstand a five-year, twenty-four hour storm, Chevron would not have committed post-complaint TSS violations. Tr. at 99:23-100:2.

[15] Because the court concludes that the wastewater treatment facility at the Orange Plant was improperly designed and does not meet the standard that Chevron itself chose, the court also concludes that the wastewater treatment facility at the Orange Plant is inadequate. The court need not, however, address the questions of whether Chevron committed operator error, whether Chevron properly maintained the Orange Plant, or whether the Orange Plant suffered from a lack of preventative maintenance.

[16] Consequently, the court need not answer the question of whether there was a likelihood of recurring violations by Chevron at the time Friends of the Earth sued Chevron.

Fact and Conclusions of Law at ¶ 94 (Dkt. #120). In making this argument, Chevron relies on *Chemical Manufacturers Association v. EPA*, 870 F.2d 177 (5th Cir. 1989), *reh'g granted, amended by* 885 F.2d 253, 256 (5th Cir. 1989), and on *American Petroleum Institute v. EPA*, 661 F.2d 340 (Former 5th Cir. 1981). Both cases, Chevron claims, support its interpretation of the upset defense.

In neither case, however, did the Fifth Circuit either interpret or examine what constitutes an upset. *See Chem. Mfrs. Ass'n*, 870 F.2d at 229-30; *Am. Petroleum Inst.*, 661 F.2d at 350-51. Nor did the Fifth Circuit hold that ninety-nine percent compliance with a technology-based NPDES permit mandates a finding that permit violations are upsets. *See Chem. Mfrs. Ass'n*, 870 F.2d at 229-30; *Am. Petroleum Inst.*, 661 F.2d at 350-51. Nor does Chevron's interpretation of the upset defense find either explicit or implicit textual support. *See* § 122.41(n)(1).[17] Accordingly, Chevron's interpretation of the upset defense is unconvincing.

"[T]he Clean Water Act recognizes neither a good faith nor a de minimis defense." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1083 (D.N.J. 1990). Instead, courts determine whether a permittee has violated that statute by applying strict liability principles and examining the text of that statute. *See, e.g., Menzel v. County Utils. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983). Similarly, one should interpret the upset defense according to that term's plain meaning. *Cf., e.g., Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 630 (D. Md. 1987). Either the defendant satisfies the conditions of the upset defense or that defendant cannot rely on the upset defense. *See* §§ 122.41(n)(1), 122(n)(3)(i)-(iv).

Accepting Chevron's argument regarding ninety-nine percent compliance would ignore the

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[17] Dr. Tischler conceded as much at trial. *See* Tr. at 579-84.

plain meaning of the upset provision. The paucity of Chevron's post-complaint TSS violations does not, by itself, mean that each of these violations qualifies as an upset. *See* §§ 122.41(n)(1), 122(n)(3)(i)-(iv). Moreover, Chevron's interpretation of the upset defense is unsupported by Fifth Circuit precedent. Consequently, this argument is unpersuasive. Chevron is liable for three post-complaint TSS violations and for sixty-two pre-complaint TSS violations.

IV.

Chevron notes, correctly, that it has not violated the TSS limitations in its NPDES permit for several years. Moreover, Chevron argues that the 1996 TSS limitations will help ensure that future permit violations will not occur. Consequently, Chevron claims that this lawsuit is moot.

The burden to prove mootness is on the party claiming that a case has become moot. *Laidlaw Envtl. Servs, Inc.*, 528 U.S. at 189. This burden is quite a heavy one. *Id.* "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Id.* at 174. Rather, a case is moot only if subsequent events have made it absolutely clear that permit violations "could not reasonably be expected to recur." *Id.* at 193 (citation omitted).

As Plaintiffs note, Chevron violated its TSS limitations in September 1997, just one year after its new TSS limitations were adopted. This TSS violation, for reasons previously explained, is not an upset. Moreover, the court has found that Chevron designed the wastewater treatment facility at the Orange Plant improperly. Thus, Chevron has not established that it is absolutely clear that its permit violations could not reasonably be expected to recur. Chevron's compliance over the last several years does not demonstrate that this case is moot.

V.

The court has found that Chevron is liable for sixty-five violations of the TSS limitations in

its NPDES permit.[18] Accordingly, the court will contact counsel for both sides in the near future to schedule a hearing. At that hearing, the court will determine Friends of the Earth's remedies, such as civil penalties, attorney fees, costs, and injunctive relief.

It is so ORDERED.

Signed this the twentieth day of July, 2004.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

[18] The court previously denied Plaintiffs' motion for reconsideration of its ruling that Chevron's pH violations are barred. Thus, Chevron is not liable for any pH violations.

Other Orders/Judgments

1:94-cv-00434-RAS Friends of the Earth v. Chevron Chemical Co

U.S. District Court [LIVE]

Eastern District of TEXAS LIVE

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Docket Text:
FINDINGS OF FACT AND CONCLUSIONS OF LAW. Signed by Judge Richard A. Schell on 7/20/04. (tkd,)

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June 20, 2006

VIA FACSIMILE AND OVERNIGHT DELIVERY

OPA
JUN 21 2006
BY

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2006 JUN 20 PM 3:19
CHIEF CLERKS OFFICE

Office of the Chief Clerk
MC 105
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, TX 78753

Re: Comments on Draft Permit and Preliminary Decision on Amendment/Renewal of TPDES Permit No. WQ0000359000 (TX 0004839)

Dear Sirs and/or Madams:

Friends of the Earth submits the following comments on the Draft Permit and Preliminary Decision on the TPDES/NPDES permit issued for the Chevron Phillips Chemical Co, LP (CPCC) facility in Orange, Texas. As you may know, Friends of the Earth filed a citizen suit in 1994 under Section 505 of the Clean Water Act against Chevron Chemical Company which following a merger changed its name to Chevron Phillips Chemical Co. The suit is still pending against CPCC and focuses on CPCC's violation of the TSS limitations in the permit. *Friends of the Earth v. Chevron Chemical Co.*, E.D. Tex, Civ. Nos. 1:94CV434, 1:94CV580. During the course of the case, CPCC has experienced a numbers of TSS violations that it considered to be upsets. The question of whether these violations were upsets was litigated before the court. The court found that the violations were not upsets for several reasons, the most important of which was that CPCC's wastewater treatment plant (WTP) is inadequate. *Friends of the Earth v. Chevron Chemical Co.*, Findings of Fact and Conclusions of Law, July 20, 2004 (Docket Document No. 127), pp. 15-16 (Enclosure 1).

CPCC is seeking an increase in its TSS limitations due to its inability to meet its permit limitations during significant rain events. It points to its "continuing difficulty complying with the daily maximum TSS limits because of large amount of storm water runoff that is periodically discharged from Outfall 001." Permit Application, Attachment 1, p. 1.

Under 40 C.F.R. 122.44(l), a reissued or renewed permit must have effluent limitations, standards, and conditions that are at least as stringent as the previous permit, except under very

limited circumstances. As EPA described this long-standing requirement when it adopted limited exceptions to it in 1984 (49 Fed. Reg. 38019 (Sept. 26, 1984)):

> This provision prohibited the reissuance of an NPDES permit with limitations, standards, and conditions less stringent than those in the previous permit unless the circumstances on which the previous permit had been issued had materially and substantially changed and constituted cause for permit modification or revocation.

This provision, which is referred to as the anti-backsliding rule, prohibits TCEQ from issuing a permit for this facility that is less stringent unless the cause exception is satisfied. Friends of the Earth does not believe that the cause exception can be satisfied for this facility.

Initially, TCEQ did not believe that the cause exception could be satisfied. It rejected CPCC's request for a modification of the TSS limitations because it would be impermissible backsliding. *See* Letter from CPCC to TCEQ referencing TCEQ's proposal to deny CPCC's request for an increase in its TSS permit limits (hereafter "CPCC Comment Letter"). CPCC responded to the proposed denial with comments that it claims show that material and substantial alterations satisfy the exception to the anti-backsliding rule.[1] The Fact Sheety and Preliminary Determination show that TCEQ accepted this claim because it issued a draft permit that increased the TSS maximum limitation. We show below that there is no basis for backsliding here.

First, there is no basis for backsliding when the treatment facilities have been found to be inadequate with regard to treating TSS during rain events. A permit modification is never justified when the treatment facilities are inadequate. It is impossible to assess whether any claimed "material and substantial alterations" to the facility justify a more lenient limitation when a properly designed and operated treatment facility may very well be able to satisfy the permit limitation regardless of the claimed "material and substantial alterations."

Second, the only TSS violation that occurred between the issuance of the 2001 permit and the 2005 permit application was due to the fact that solids were scoured out of the Cube Pond. CPCC claims that this was caused by the accumulation of solids in the Cube Pond and that this should be remedied by annual dredging of the solids from the Cube Pond. Letter dated October 17, 2002, from CPCC to TCEQ (Enclosure 2). Thus, CPCC implicitly admits that this violation was attributable to its own failure to perform proper maintenance of its facilities. More importantly, however, engineering analysis of the capabilities of CPCC's treatment facilities shows that, even with CPCC's new program of removing sediments from the Cube Pond semi-annually, solids in the

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[1] CPCC also claims an exception based on new information, however, the claims of material alterations and new information are the same, below we refer to them only as material alterations

Cube Pond will be scoured during rainfall events due to insufficient weir capacity between the various chambers of the Cube Pond which causes flow velocities that resuspend the settled sediments and cause excess TSS in the discharge.

Third, CPCC claims that "a major change that has occurred at the Orange Plant that justifies an exemption from the anti-backsliding provisions is the permanent shutdown and demolition of the LDPE plant, boiler house and the pilot plant." CPCC Comment Letter, p. 2. CPCC further claims that "[s]torm water from these areas will contain TSS concentrations that are typical of sites where 'industrial activities' are conducted, and TSS limits at Outfall 001 should account for these changed operations at the Orange Plant." CPCC Comment Letter, p. 2. CPCC contends that these changes "constitute a 'material and substantial altteration' of the Orange Plant and therefore should exempt the requested TSS increase from the anti-backsliding provisions as provided at 40 C.F.R. 122.41(1)(2)(i)(A)." CPCC Comment Letter, p. 2. In fact, none of these changes increase the TSS concentration in the stormwater discharged through Outfall 001. The changes are either neutral or reduce the TSS. Prior to its shutdown and demolition, the LDPE plant constituted an impervious, concrete surface for stormwater runoff purposes. Following its demolition, the area was converted from concrete to grass. Permit Application, Attachment 9. Grass surfaces, of course, produce less flow and fewer solids than concrete surfaces. Indeed, the area was more "urbanized" before LDPE was removed than after. Therefore, the demolition of the LDPE plant justifies a reduction in the TSS limitation, not an increase.

Demolition of the pilot plant and the boiler house each represent a neutral change from a stormwater standpoint. The pilot plant area is located in an area of the plant that during storm events is tributary to the rice gates. CPCC's standard operating procedure is to close the rice gates during storm events. The effect of this is that all stormwater in the area tributary to the rice gates is held back from the WTP during storm events.[2/] Following the storm event, the rice gates are opened and the water is bled into the WTP. Accordingly, the rice gates, in effect, serve as a stormwater surge tank. During a storm event, none of the stormwater runoff from the pilot plant area ever reaches the WTP. Consequently, this stormwater does not affect the level of TSS in the discharge during a storm event.[3/]

[2/]CPCC admitted during the course of the litigation that the rice gates have never been overtopped

[3/]We note that this is not the first instance where CPCC has misrepresented facts about its stormwater flows to TCEQ. On August 3, 1994, in response to an Administrative Order that was issued by EPA for CPCC's TSS violations, CPCC wrote to EPA detailing the interim measures it would take. Pl. Trial Ex. 54 (Enclosure 3). On August 23, 1994, CPCC sent almost the same letter to TNRCC, which is now TCEQ. Pl. Trial Ex. 16 (Enclosure 4). CPCC identified a stormwater surge tank as one of the interim measures it was using as a storm surge control and stated that "[t]his system is now capable of retaining 2.2 million gallons." Pl. Trial Ex.16, p. 2; Pl. Trial Ex. 54, p. 2. CPCC

The boiler house, like the LDPE area, is in an area that is not tributary to the rice gates. Nevertheless, its demolition also represents a neutral change in terms of stormwater flows and TSS loads in that stormwater. Both before and after demolition, the boiler house constituted an impervious, concrete surface. Therefore, the stormwater flows and TSS load in the stormwater from this area remains the same. Furthermore, the steam that is now purchased as a substitute for the steam generated by the old boiler house, is "condensed after exiting the process and drained to the fire pond, which drains to the wastewater treatment system." Permit Application, Attachment 9. The fire pond is in the area of the plant that is tributary to the rice gates. Therefore, this steam condensate does not reach the WTP during a storm event.

Friends of the Earth has retained the services of a highly-qualified engineer, Dr. Bruce A. Bell, to review CPCC's treatment facilities as part of the litigation. Dr. Bell has been recognized by many courts as an expert in the field of environmental engineering, particularly wastewater treatment. Dr. Bell testified before the district court that the treatment facilities were inadequate. As noted above, the district court found the facilities to be inadequate. More recently, Dr. Bell has performed an engineering analysis with regard to the facilities and determined that modifications to the Cube Pond are necessary to eliminate the scouring effect and to meet the current TSS limitations. As part of the analysis, Dr. Bell used the flows and TSS loads that would be produced by the plant with the changes that CPCC claims represent a "material and substantial alteration[]." This analysis clearly shows that CPCC's claimed "material and substantial alterations" actually reduce the TSS loads on the WTP compared to the Orange Plant's configuration prior to these changes.

Moreover, the analysis shows that with modifications to the Cube Pond, the WTP is able to meet the current TSS limitation with the flow and TSS load imposed upon it as the plant is currently configured (*i.e.* with the alterations that CPCC claims justify an increase in its TSS limitations).

Fourth, closure of the LDPE plant reduced the solids loading on the WTP from process wastewater flows. CPCC's WTP is set up in such a way that, during storm events, process wastewaters have preferential treatment over stormwater in the Dissolved Air Flotation (DAF) unit. *See* Permit Application, Attachment 1. Any flows greater than 2,500 gpm are routed around the

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failed to mention that the surge tank would only retain stormwater already retained by the rice gate. Pl. Trial Ex. 60, p. 120 (p. 5). CPCC admitted that the tank did nothing more than was already done by the rice gates during Friends of the Earth's pending case. Pl. Trial Ex. 60, pp. 120-121.

Although CPCC mentions the rice gates in Attachment 1 to its permit application, it does not reveal the fact that the storm and process waters collected in the rice-gated area do not reach the WTP during storm events and are therefore irrelevant to an assessment of the appropriate TSS limitations for the stormwater fraction of the discharge.

DAF directly to the Cube Pond before discharge. The elimination of process wastewater flows from the LDPE plant created more capacity for the treatment of stormwater in the DAF. Absent the scour effect in the Cube Pond, the elimination of the LDPE process wastewater stream should reduce the level of solids in the discharge because more stormwater is treated in the DAF.

Fifth, throughout the permit application, CPCC makes representations regarding flows. However, nowhere in the application has CPCC represented how much of this volume and percentage of the total flows are amounts that are relevant in evaluating compliance with the TSS limitations during storm events. We encourage TCEQ to demand that CPCC explain how much of each of its contributing wastestreams is irrelevant during storm events due to the fact that all or some of the particular wastestream is held back from the WTP by the rice gates during a storm event.

Sixth, during a site visit to the plant this month, Friends of the Earth's expert, Dr. Bell, observed instances where CPCC had failed to institute erosion control measures to stabilize materials that would contribute solids to the discharge during a storm event. The TSS limitation should not be increased under the circumstance where CPCC has failed to follow a rudimentary BMP.

Seventh, in light of all of the above, there is no justification for allowing the addition of further TSS from this plant into West Bunch Gully which is identified as having "high aquatic life uses." Fact Sheet and Preliminary Decision, p. 6. Additional solids in this stream, as well as the downstream waters, will negatively impact the "high aquatic life uses." Moreover, the Clean Water Act is structured in such a way that dischargers are suppose to be moving toward -- indeed, already to have reached -- the goal of zero-discharge of pollutants. Backsliding on CPCC's TSS limitation under circumstances where its WTP has been adjudged inadequate by a federal court is an affront to the Congressionally prescribed goal of zero-discharge into the nation's waterways.

In closing, we wish to express our appreciation for the opportunity to comment on the draft permit. Please add Friends of the Earth to the mailing list for this permit action and send future materials to it via its counsel.

Sincerely,

Carolyn Smith Pravlik
Counsel for Friends of the Earth

Enclosures

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FACSIMILE COVER SHEET

TO:	Office of Chief Clerk MC 105 Texas Commission on Environmental Quality	512-239-3311
FROM:	Carolyn Smith Pravlik	
DATE:	June 20, 2006	
ATTACHMENT:	Comments on Draft Permit and Preliminary Decision on Amendment/Renewal of TPDES Permit No. WQ0000359000 (TX 0004839)	
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CHRON:	☐ Yes ☒ No	

CHIEF CLERKS OFFICE
2006 JUN 20 PM 3:19
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

MESSAGE:

Attached are Comments on Draft Permit and Preliminary Decision on Amendment/Renewal of TPDES Permit No. WQ0000359000 (TX 0004839). The original with the enclosures will be delivered on June 21, 2006 by FedEx.

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June 20, 2006

VIA FACSIMILE AND OVERNIGHT DELIVERY

Office of the Chief Clerk
MC 105
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, TX 78753

Re: Comments on Draft Permit and Preliminary Decision on Amendment/Renewal of TPDES Permit No. WQ0000359000 (TX 0004839)

Dear Sirs and/or Madams:

Friends of the Earth submits the following comments on the Draft Permit and Preliminary Decision on the TPDES/NPDES permit issued for the Chevron Phillips Chemical Co, LP (CPCC) facility in Orange, Texas. As you may know, Friends of the Earth filed a citizen suit in 1994 under Section 505 of the Clean Water Act against Chevron Chemical Company which following a merger changed its name to Chevron Phillips Chemical Co. The suit is still pending against CPCC and focuses on CPCC's violation of the TSS limitations in the permit. *Friends of the Earth v. Chevron Chemical Co.*, E.D. Tex, Civ. Nos. 1:94CV434, 1:94CV580. During the course of the case, CPCC has experienced a numbers of TSS violations that it considered to be upsets. The question of whether these violations were upsets was litigated before the court. The court found that the violations were not upsets for several reasons, the most important of which was that CPCC's wastewater treatment plant (WTP) is inadequate. *Friends of the Earth v. Chevron Chemical Co.*, Findings of Fact and Conclusions of Law, July 20, 2004 (Docket Document No. 127), pp. 13-16 (Enclosure 1).

CPCC is seeking an increase in its TSS limitations due to its inability to meet its permit limitations during significant rain events. It points to its "continuing difficulty complying with the daily maximum TSS limits because of large amount of storm water runoff that is periodically discharged from Outfall 001." Permit Application, Attachment 1, p. 1.

Under 40 C.F.R. 122.44(l), a reissued or renewed permit must have effluent limitations, standards, and conditions that are at least as stringent as the previous permit, except under very

limited circumstances. As EPA described this long-standing requirement when it adopted limited exceptions to it in 1984 (49 Fed. Reg. 38019 (Sept. 26, 1984)):

> This provision prohibited the reissuance of an NPDES permit with limitations, standards, and conditions less stringent than those in the previous permit unless the circumstances on which the previous permit had been issued had materially and substantially changed and constituted cause for permit modification or revocation.

This provision, which is referred to as the anti-backsliding rule, prohibits TCEQ from issuing a permit for this facility that is less stringent unless the cause exception is satisfied. Friends of the Earth does not believe that the cause exception can be satisfied for this facility.

Initially, TCEQ did not believe that the cause exception could be satisfied. It rejected CPCC's request for a modification of the TSS limitations because it would be impermissible backsliding. *See* Letter from CPCC to TCEQ referencing TCEQ's proposal to deny CPCC's request for an increase in its TSS permit limits (hereafter "CPCC Comment Letter"). CPCC responded to the proposed denial with comments that it claims show that material and substantial alterations satisfy the exception to the anti-backsliding rule.[1/] The Fact Sheety and Preliminary Determination show that TCEQ accepted this claim because it issued a draft permit that increased the TSS maximum limitation. We show below that there is no basis for backsliding here.

First, there is no basis for backsliding when the treatment facilities have been found to be inadequate with regard to treating TSS during rain events. A permit modification is never justified when the treatment facilities are inadequate. It is impossible to assess whether any claimed "material and substantial alterations" to the facility justify a more lenient limitation when a properly designed and operated treatment facility may very well be able to satisfy the permit limitation regardless of the claimed "material and substantial alterations."

Second, the only TSS violation that occurred between the issuance of the 2001 permit and the 2005 permit application was due to the fact that solids were scoured out of the Cube Pond. CPCC claims that this was caused by the accumulation of solids in the Cube Pond and that this should be remedied by annual dredging of the solids from the Cube Pond. Letter dated October 17, 2002, from CPCC to TCEQ (Enclosure 2). Thus, CPCC implicitly admits that this violation was attributable to its own failure to perform proper maintenance of its facilities. More importantly, however, engineering analysis of the capabilities of CPCC's treatment facilities shows that, even with CPCC's new program of removing sediments from the Cube Pond semi-annually, solids in the

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[1/]CPCC also claims an exception based on new information, however, the claims of material alterations and new information are the same, below we refer to them only as material alterations.

Cube Pond will be scoured during rainfall events due to insufficient weir capacity between the various chambers of the Cube Pond which causes flow velocities that resuspend the settled sediments and cause excess TSS in the discharge.

Third, CPCC claims that "a major change that has occurred at the Orange Plant that justifies an exemption from the anti-backsliding provisions is the permanent shutdown and demolition of the LDPE plant, boiler house and the pilot plant." CPCC Comment Letter, p. 2. CPCC further claims that "[s]torm water from these areas will contain TSS concentrations that are typical of sites where 'industrial activities' are conducted, and TSS limits at Outfall 001 should account for these changed operations at the Orange Plant." CPCC Comment Letter, p. 2. CPCC contends that these changes "constitute a 'material and substantial altteration' of the Orange Plant and therefore should exempt the requested TSS increase from the anti-backsliding provisions as provided at 40 C.F.R. 122.41(1)(2)(i)(A)." CPCC Comment Letter, p. 2. In fact, none of these changes increase the TSS concentration in the stormwater discharged through Outfall 001. The changes are either neutral or reduce the TSS. Prior to its shutdown and demolition, the LDPE plant constituted an impervious, concrete surface for stormwater runoff purposes. Following its demolition, the area was converted from concrete to grass. Permit Application, Attachment 9. Grass surfaces, of course, produce less flow and fewer solids than concrete surfaces. Indeed, the area was more "urbanized" before LDPE was removed than after. Therefore, the demolition of the LDPE plant justifies a reduction in the TSS limitation, not an increase.

Demolition of the pilot plant and the boiler house each represent a neutral change from a stormwater standpoint. The pilot plant area is located in an area of the plant that during storm events is tributary to the rice gates. CPCC's standard operating procedure is to close the rice gates during storm events. The effect of this is that all stormwater in the area tributary to the rice gates is held back from the WTP during storm events.[2/] Following the storm event, the rice gates are opened and the water is bled into the WTP. Accordingly, the rice gates, in effect, serve as a stormwater surge tank. During a storm event, none of the stormwater runoff from the pilot plant area ever reaches the WTP. Consequently, this stormwater does not affect the level of TSS in the discharge during a storm event.[3/]

[2/]CPCC admitted during the course of the litigation that the rice gates have never been overtopped.

[3/]We note that this is not the first instance where CPCC has misrepresented facts about its stormwater flows to TCEQ. On August 3, 1994, in response to an Administrative Order that was issued by EPA for CPCC's TSS violations, CPCC wrote to EPA detailing the interim measures it would take. Pl. Trial Ex. 54 (Enclosure 3). On August 23, 1994, CPCC sent almost the same letter to TNRCC, which is now TCEQ. Pl. Trial Ex. 16 (Enclosure 4). CPCC identified a stormwater surge tank as one of the interim measures it was using as a storm surge control and stated that "[t]his system is now capable of retaining 2.2 million gallons." Pl. Trial Ex.16, p. 2; Pl. Trial Ex. 54, p. 2. CPCC

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DAF directly to the Cube Pond before discharge. The elimination of process wastewater flows from the LDPE plant created more capacity for the treatment of stormwater in the DAF. Absent the scour effect in the Cube Pond, the elimination of the LDPE process wastewater stream should reduce the level of solids in the discharge because more stormwater is treated in the DAF.

Fifth, throughout the permit application, CPCC makes representations regarding flows However, nowhere in the application has CPCC represented how much of this volume and percentage of the total flows are amounts that are relevant in evaluating compliance with the TSS limitations during storm events. We encourage TCEQ to demand that CPCC explain how much of each of its contributing wastestreams is irrelevant during storm events due to the fact that all or some of the particular wastestream is held back from the WTP by the rice gates during a storm event.

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Seventh, in light of all of the above, there is no justification for allowing the addition of further TSS from this plant into West Bunch Gully which is identified as having "high aquatic life uses." Fact Sheet and Preliminary Decision, p. 6. Additional solids in this stream, as well as the downstream waters, will negatively impact the "high aquatic life uses." Moreover, the Clean Water Act is structured in such a way that dischargers are suppose to be moving toward -- indeed, already to have reached -- the goal of zero-discharge of pollutants. Backsliding on CPCC's TSS limitation under circumstances where its WTP has been adjudged inadequate by a federal court is an affront to the Congressionally prescribed goal of zero-discharge into the nation's waterways.

In closing, we wish to express our appreciation for the opportunity to comment on the draft permit. Please add Friends of the Earth to the mailing list for this permit action and send future materials to it via its counsel.

Sincerely,

Carolyn Smith Pravlik
Counsel for Friends of the Earth

Enclosures

Enclosure 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FRIENDS OF THE EARTH, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 1:94-CV-434
	§	Case No. 1:94-CV-580
CHEVRON CHEMICAL COMPANY,	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Plaintiff Friends of the Earth, Inc. ("Friends of the Earth") is a non-profit corporation organized under the laws of the District of Columbia. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 827 (5th Cir. 1997). For years, Friends of the Earth has "promote[d] a broad agenda of environmental awareness and improvement projects." *Id.* Friends of the Earth has sought to implement this agenda, in part, through lawsuits filed in district courts, including this one. *Id.* at 827 & n.1.

Defendant Chevron Chemical Company ("Chevron") manufactures polyethylene at its plant in Orange, Texas ("the Orange Plant"). *Id.* at 827. Under its National Pollution Discharge Elimination System ("NPDES") permit, Chevron discharges process water and storm water from the Orange Plant into Round Bunch Gully, which flows into Cow Bayou, and then to the Sabine River and into Sabine Lake. *Id.* Chevron's NPDES permit limits the amount of total suspended solids ("TSS")[1] that Chevron may discharge. *Id.* "Between October 1990 and January 1994, Chevron

[1] TSS is comprised of dirt, polyethylene particles, and biological solids. Tr. at 72, 74.

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exceeded its TSS limits." *Id.*

Friends of the Earth eventually learned of these developments. *See id.* The organization filed a private civil enforcement lawsuit in July 1994 against Chevron under the Federal Water Pollution Control Act, 33 U.S.C. §1365 (1994) ("the Clean Water Act"). *Id.*[2] Friends of the Earth alleged that Chevron had committed numerous violations of its NPDES permit. *Id.* After its lawsuit was filed, Friends of the Earth filed a second lawsuit alleging additional permit violations by Chevron. *Id.* This court consolidated both cases. *Id.*

Both Friends of the Earth and Chevron filed motions for summary judgment. The court denied Friends of the Earth's motion for summary judgment and granted in part and denied in part Chevron's motion for summary judgment. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 83-84 (E.D. Tex. 1995). Notably, the court found that a genuine issue of material fact existed regarding Friends of the Earth's TSS claims. *Id.* at 83. The court, however, concluded that Chevron was entitled to summary judgment on Friends of the Earth's other claims. *Id.* at 83-84. The court found that Friends of the Earth's claim for injunctive relief and its claim for civil penalties were not moot. *Id.* at 84. Finally, the court concluded that Friends of the Earth had constitutional standing to bring this lawsuit. *Id.* at 74-77.[3]

The court held a three-day bench trial in January 1996. During that trial, Friends of the Earth presented four witnesses on the issue of constitutional standing: Delaine Sweat, Margaret Green, Opal Fruge, and Rodney Crowl. Tr. at 32-67. Friends of the Earth also presented Dr. Bruce Bell as

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[2] Chevron first gave the Environmental Protection Agency ("EPA") the required sixty days notice. *Id.*

[3] The court later entered an order saying that standing would be an issue for trial because a fact issue remained concerning standing.

its expert witness. *Id.* at 69-139. Chevron called three company representatives–Chuck Miller, Dale Durr, and Jeff Downing–to testify. *Id.* at 213-388. Chevron also elicited testimony from its expert witness, Dr. Lial Tischler. *Id.* at 438-650.

A few months after trial, the court dismissed Friends of the Earth's lawsuit for lack of subject matter jurisdiction. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 919 F. Supp. 1042, 1047 (E.D. Tex. 1996). Specifically, the court held that Friends of the Earth failed to prove that its complaining witnesses were actually members of Friends of the Earth. *Id.* Thus, the court concluded that Friends of the Earth lacked associational standing to bring this civil action. *Id.* Friends of the Earth appealed that order to the Fifth Circuit.

The Fifth Circuit found that the complaining witnesses satisfied the test for membership and concluded that Friends of the Earth has associational standing to represent its members. Thus, the Fifth Circuit reversed this court's order dismissing the case. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997). The Fifth Circuit remanded the case to this court for further proceedings. *Id.* This court then held a hearing on October 13, 1998, during which time the court heard further testimony as well as the arguments of counsel. Since that time, both parties have submitted briefs, motions, and proposed findings of fact and conclusions of law to the court.

II.

To litigate a civil action, a plaintiff must have constitutional standing. *See* U.S. CONST. art. III, § 2. This requirement "focuses upon '[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Save Our Community v. EPA*, 971 F.2d 1155, 1160 (5th Cir. 1992) (per curiam) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972)). "The party invoking federal jurisdiction bears the burden of establishing

[standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted).

An organization such as Friends of the Earth has standing to bring a civil action on behalf of its members if "(1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 555 (5th Cir. 1996) (citations omitted). Here, Chevron does not dispute that Friends of the Earth has met the last two prongs of this test. Instead, Chevron claims the court should dismiss this lawsuit because Friends of the Earth's members would not have standing to sue individually.

In order to have standing to sue individually, a member of an organization must meet three requirements. Specifically, a member "must show that: (1) he has suffered an actual or threatened injury as a result of the actions of the defendant; (2) the injury is 'fairly traceable' to the defendant's actions; and (3) the injury will likely be redressed if he prevails in his lawsuit." *Id.* at 556 (citations omitted); *see also Save Our Community*, 971 F.2d at 1160. Chevron vociferously argues that Friends of the Earth's members meet none of these three requirements. The court consequently examines whether Friends of the Earth's members meet each of these requirements.

A.

To establish individual standing, a party must show that it has suffered injury in fact. *See, e.g., Friends of the Earth, Inc v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 187 (2000). As the Fifth Circuit has observed, "the threshold for the injury requirement is fairly low." *Sierra Club, Lone Star Chapter*, 73 F.3d at 557 n.23 (citations omitted). Because a party's "injuries need not be large, an 'identifiable trifle' will suffice." *Pub. Interest Research Group of N.J., Inc v. Powell*

Duffryn Terminals, Inc., 913 F.2d 64, 71 (3d Cir. 1990) (citation omitted).[4]

In Clean Water Act cases, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Laidlaw Envtl. Servs, Inc.*, 528 U.S. at 181. Thus, "harm to aesthetic, environmental, or recreational interests is sufficient to confer standing, provided that the party seeking review is among the injured." *Save Our Community*, 971 F.2d at 1161 (citing *Morton*, 405 U.S. at 734-35). A plaintiff may establish harm to his or her aesthetic, environmental, or recreational interests through testimony and affidavits. *See, e.g., Laidlaw Envtl. Servs., Inc.*, 528 U.S. at 181-83.

For example, in *Laidlaw*, members of Friends of the Earth submitted affidavits asserting that they wanted to recreate on waters downstream of the defendant's discharge of mercury. *Id.* These members, however, refrained from doing so due to concerns that the water was quite polluted. *Id.* There, as here, the defendant claimed that Friends of the Earth lacked standing because its members had failed to show that they had "sustained or faced the threat of any 'injury in fact.'" *Id.* at 181.

The Supreme Court, however, concluded to the contrary. *Id.* at 184. The Court held that the affidavits submitted by Friends of the Earth's members "adequately documented injury in fact." *Id.* at 183. In those affidavits, Friends of the Earth's members "assert[ed] that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 183-84. Thus, the Court held that Friends of the Earth's members had suffered injury in fact and had standing under Article III to bring that action. *Id.* at 189.

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[4] The Third Circuit's opinion in *Powell Duffryn* has been acknowledged by, endorsed by, and applied by the Fifth Circuit. *See Sierra Club, Lone Star Chapter*, 73 F.3d at 557; *Save Our Comm.*, 971 F.2d at 1161. Thus, this court relies on and applies *Powell Duffryn* as well.

Here, as in *Laidlaw*, Friends of the Earth's members have legitimate recreational and aesthetic interests. *See* Tr. at 32-67. Each of Friends of the Earth's members who testified at trial complained that their recreational activities have been adversely affected. *See id.* Notably, Delaine Sweat testified that she previously walked, drove along, and fished in Sabine Lake, but stopped doing so because the water appeared cloudy and polluted. *Id.* at 44-48. Margaret Green testified that she had fished and boated in Sabine Lake, but would not do so consistently due to the reduced aesthetic beauty of Sabine Lake. Tr. at 60-62. Opal Fruge testified that she no longer boats and fishes on Sabine Lake because of the water's appearance and condition. *Id.* at 34-36. Finally, Rodney Crowl testified that he had visited Sabine Pass to eat seafood, but stopped doing so because he was concerned about the quality and condition of fish caught in Lake Sabine. *Id.* at 56.

It is well settled that harm to aesthetic, environmental, or recreational interests constitutes an injury in fact. *See, e.g., Laidlaw*, 528 U.S. at 183-84; *Morton*, 405 U.S. at 734-35. The injuries asserted by Friends of the Earth's members in *Laidlaw* are similar to the injuries asserted by Friends of the Earth's members in this case. *Compare Laidlaw*, 528 U.S. at 183-84, *with* Tr. at 32-67. Friends of the Earth's members have sufficiently demonstrated that Chevron's TSS discharges adversely affected their recreational interests. Consequently, Friends of the Earth's members have suffered injuries in fact. *Id.*; *see also Sierra Club, Lone Star Chapter*, 73 F.3d at 556-57.

B.

The second requirement for individual standing is that the injuries suffered by an individual must be "fairly traceable" to the defendant's permit violations. *See, e.g., Sierra Club, Lone Star Chapter*, 73 F.3d at 557. Like the requirement of injury in fact, this requirement is not a demanding one. *See, e.g., Save Our Community*, 971 F.2d at 1161. Indeed, "[t]he requirement that plaintiff's

injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that [the] defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72; *see also Save Our Community*, 971 F.2d at 1161. Nor must plaintiffs "pinpoint[] the origins of particular molecules" in order to satisfy this requirement. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc).

Instead, a plaintiff satisfies this requirement by showing that a defendant has

> 1) discharged some pollutant in concentrations greater than allowed by its permit
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that
> 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Powell Duffryn Terminals, Inc., 913 F.2d at 72 (footnote omitted). This test has been applied in Clean Water Act cases by the Fifth Circuit. *Sierra Club, Lone Star Chapter*, 73 F.3d at 557. Accordingly, the court examines whether Friends of the Earth's witnesses satisfy the *Powell Duffryn* test.

1.

Regarding the first prong of the *Powell Duffryn* test, Chevron violated the TSS limitations in its NPDES permit sixty-five times. *See* Pl.'s Ex. 8 (Trial--Jan. 17, 1996). Consequently, Chevron has discharged TSS at levels greater than allowed by its NPDES permit. Thus, Friends of the Earth's members have satisfied the first prong of the *Powell Duffryn* test.

2.

Regarding the second prong of the *Powell Duffryn* test, Chevron avers that it does not discharge TSS into a waterway in which Friends of the Earth's members have an interest that is or

may be adversely affected. At trial, Friends of the Earth's witnesses complained mainly about pollution in Sabine Lake. *See, e.g.*, Tr. at 32-33, 43, 55, 59-60. Chevron points out that it does not discharge TSS directly into Sabine Lake. *See* Def.'s Exs. K, L. Instead, Chevron's TSS discharge flows into Round Bunch Gully, then into Cow Bayou, and then into the Sabine River, which empties into Sabine Lake. Def.'s Ex. L. Thus, there are intermediate bodies of water between the Orange Plant and Sabine Lake. *See id.*

Although the Orange Plant is not situated on the shore of Sabine Lake, the distance between these two locations is only about four miles at most. *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F. Supp. 67, 75 (E.D. Tex. 1995). Contrary to what Chevron implies, there is no "mileage or tributary limit for plaintiffs proceeding under the citizen suit provision of the CWA." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996). Moreover, the distance between the Orange Plant and Sabine Lake is well within the range of distances in cases where courts have found the "fairly traceable" requirement to have been satisfied. *Compare Chevron Chem. Co.* 900 F. Supp at 75, *with Laidlaw Envtl. Servs.*, 528 U.S. at 181-84, *and Gaston Copper Recycling Corp.*, 204 F.3d at 161-62.

Here, Chevron has discharged TSS that, eventually, reached Sabine Lake. Friends of the Earth's members recreate in, on, near, and around Sabine Lake. Tr. at 32-33, 43, 55, 59-60. Because their recreational interests have been adversely affected by Chevron's TSS discharges, Friends of the Earth's members have satisfied the second prong of the *Powell Duffryn* test.[5]

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[5] Admittedly, the Fifth Circuit once noted, in *dictum*, that "some 'waterways' covered by the CWA may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing." *Sierra Club, Lone Star Chapter*, 73 F.3d at 558 n.24 (citations omitted). Soon after *Sierra Club*, the Fifth Circuit in *Crown Central Petroleum* found that the plaintiffs had not satisfied the "fairly

3.

Regarding the third prong of the *Powell Duffryn* test, the court finds that Chevron's TSS discharge contributed to the kinds of injuries alleged by Friends of the Earth's members. Friends of the Earth's members testified at trial that Sabine Lake and the Gulf of Mexico appeared both murky and polluted. Tr. at 35, 45, 61. Moreover, Friends of the Earth's members claimed that their recreational interests in, on, and near Sabine Lake have been negatively affected by the appearance of the water in Sabine Lake. *Id.* at 32-33, 43, 55, 59-60.

It is undisputed that TSS makes water appear dirty and opaque. *Id.* at 74. Moreover, high levels of TSS adversely affect fish populations as well as the quality of water. *Id.* Chevron previously discharged TSS in quantities that exceeded its permit limitations. Moreover, Chevron's TSS discharge eventually reached Sabine Lake. Because its TSS discharge adversely affected a body of water in which Friends of the Earth's members have recreational interests, Chevron contributed to the recreational injuries that Friends of the Earth's members suffered. *See Powell Duffryn*

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traceable" requirement because the refinery at issue was eighteen miles from the body of water used by plaintiffs. 95 F.3d at 361-62. Relying on *dictum* in *Sierra Club* and on the holding of *Crown Central Petroleum*, Chevron contends that the distance between the Orange Plant and Sabine Lake is too vast for the court to find that Friends of the Earth's members have met the "fairly traceable" requirement.

Here, however, the distance between the Orange Plant and Sabine Lake is far less than the relevant distance in *Crown Central Petroleum*. *Id.* at 361. Friends of the Earth has shown and the court has concluded that Chevron's TSS discharge eventually flows into Sabine Lake. Additionally, Friends of the Earth has shown that its members have legitimate recreational interests in Sabine Lake. Consequently, *Crown Central Petroleum* is inapposite. Although Friends of the Earth's interest in Galveston Bay in *Crown Central Petroleum* "passe[d] Article III bounds," *id.*, Friends of the Earth's interest in Sabine Lake in this lawsuit is within Article III bounds.

Terminals, Inc., 913 F.2d at 72.[6]

C.

The final requirement for individual standing is redressability, which means that a plaintiff's injuries are "likely to be redressed by a favorable [judicial] decision." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (quotation & footnote omitted). This requirement concerns "the connection between the plaintiff's injury and the judicial relief sought." *Save Our Comm.*, 971 F.2d at 1161 (citation omitted). The possibility that the relief sought will redress a plaintiff's injuries must be not merely speculative, but likely. *See Laidlaw Envtl. Servs, Inc.*, 528 U.S. at 187.

Here, Friends of the Earth, on behalf of its members, seeks an award of civil penalties from Chevron. Although civil penalties are paid to the United States Treasury and not given to a successful plaintiff, the deterrent effect of an award of civil penalties on a defendant serves "[t]he general public interest in clean waterways." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 73. Consequently, it is well settled that if an organization seeks an award of civil penalties on behalf of its members, the redressability requirement is satisfied. *See Laidlaw Envtl. Servs., Inc.*, 528 U.S. at

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[6] Chevron contends that Friends of the Earth's members must demonstrate that Chevron's TSS discharge in particular injured one of Friends of the Earth's members. This argument, however, is untenable under Fifth Circuit precedent. As the Fifth Circuit noted in *Sierra Club, Lone Star Chapter*, a member of an organization only needs to show that the defendant's discharge contributed to the types of recreational injuries alleged by that member. 73 F.3d at 558. A plaintiff need not "show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72; *see also Save Our Comm.*, 971 F.2d at 1161. This argument is unpersuasive.

187.[7]

Such a situation exists in this lawsuit. Because Friends of the Earth seeks an award of civil penalties, the injuries of its members are likely to be redressed by a favorable decision in this case. *See id.* Consequently, the court finds that Friends of the Earth has satisfied the redressability requirement. *Id.*[8]

The court finds that Friends of the Earth's members would have standing to sue Chevron individually. Thus, Friends of the Earth has constitutional standing. The court now considers the question of whether Friends of the Earth has statutory standing.

III.

To establish statutory standing under the Clean Water Act, plaintiffs must allege "a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). The Clean Water Act does not, however, "permit citizen [law]suits for wholly past violations." *Id.* at 64. Thus, a plaintiff must "make a good-faith allegation of continuous or intermittent violation" at the beginning of the lawsuit. *Id.*

The Fifth Circuit has stated that a plaintiff may prove an ongoing violation either

> (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a

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[7] *See also Powell Duffryn Terminals, Inc.*, 913 F.2d at 73; *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695 (4th Cir. 1989); *Pub. Interest Research Group of N.J. v. Star Enter.*, 771 F. Supp. 655, 664 (D.N.J. 1991); *Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Labs.*, 617 F. Supp. 1190, 1200-02 (D.N.J. 1985).

[8] Chevron contends that Friends of the Earth's claims cannot be redressed by a favorable decision in this lawsuit because this lawsuit is moot. For reasons to be explained, the court finds that this lawsuit is not moot. Thus, this argument is unpersuasive.

> continuing likelihood of recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.

Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1062 (5th Cir. 1991) (quotation omitted). Under the first avenue, proof of post-complaint violations establishes statutory standing. *See id.*[9] Moreover, even proof of a single post-complaint violation conclusively establishes statutory standing. *Id.* at 1065 n.12.

Here, Chevron violated its TSS limitations three times after Friends of the Earth filed its lawsuit. Chevron exceeded its TSS limitations on April 10, 1995, Pl.'s Exs. 8 & 55 (Trial–Jan. 17, 1996), on August 30, 1996, Def.'s Ex. R (Hearing–Oct. 13, 1998), and on September 17, 1997. Def.'s Ex. V (Hearing–Oct. 13, 1998). Chevron has asserted the affirmative defense of upset for each of these TSS violations. *See* 40 C.F.R. § 122.41(n) (2000). The court examines each claim in turn.

A.

Chevron contends that its TSS violation on April 10, 1995 was an upset. An upset is "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee." *Id.* § 122.41(n)(1).[10] An upset, if proven, is an affirmative defense to a permit violation. *Id.* § 122.41(n)(2).

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[9] *See also Natural Res. Def. Council, Inc v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 501-02 (3d Cir. 1993); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Inc.*, 844 F.2d 170, 171-72 (4th Cir. 1988) (per curiam).

[10] Chevron's NPDES permit contains an almost identical definition. Pl.'s Ex. 3, Part III(B)(5). Friends of the Earth acknowledges that Chevron's NPDES permit is technology-based.

"[T]he permittee seeking to establish the occurrence of an upset has the burden of proof." *Id.* § 122.41(n)(4). Additionally, the permittee must demonstrate, through relevant evidence, the following:

> (i) An upset occurred and [] the permittee can identify the cause(s) of the upset;
> (ii) The permitted facility was at the time being properly operated; and
> (iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).
> (iv) The permittee complied with any remedial measures required under paragraph (d) of this section.

Id. § 122.41(n)(3)(i)-(iv). A permittee's failure to establish compliance with any of these four requirements prevents that permittee from claiming that an upset occurred. *See id.* § 122.41(n)(3). If the defendant proves each of these four conditions, the court must then evaluate whether the incident at issue qualifies as an upset under section 122.41(1). *See id.* § 122.41(n)(1). Here, Chevron has satisfied all four conditions and thus may assert that upsets occurred.

There are, however, situations in which the upset defense is unavailable to a permittee. *See id.* Specifically, "[a]n upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation." *Id.* If a plaintiff proves that any of these situations existed, the upset defense is inapplicable. *See id.* Here, Friends of the Earth claims, among other things, that Chevron designed its treatment facilities improperly.

In designing a wastewater treatment plant, engineers must ensure that the facility is sufficient to handle the volume of runoff from rainstorms. To do so, engineers must choose a design storm in order to estimate the amount of runoff. The design storm must address two key factors: the total volume of runoff and the rate at which that runoff will occur. Both factors are affected by the

amount of rainfall, the duration of a rainstorm, and the physical characteristics of the wastewater treatment plant. In choosing a design storm, one should do so based on a significant amount of rainfall data. *See* Tr. at 87:22-31.

In correspondence with both the EPA and the TNRCC, Chevron informed both agencies that it had designed the treatment facility at the Orange Plant to handle a five-year, twenty-four hour storm event.[11] A five-year, twenty-four hour storm event is a statistical concept, not an actual storm. Tr. at 87:4. It represents the total rainfall that would result from a storm that occurs once every five years and lasts twenty-four hours. *Id.*; *see also* Pl.'s Ex. 65, p. 12.

Designing a wastewater treatment facility for a five-year, twenty-four hour storm means that the facility is "adequate to handle the total volume and the rate of runoff that would result from a storm that would occur on the average once every five years." *Id.* at 88:4-6. For Orange, Texas, the five-year, twenty-four hour storm will result in 7.3 inches of rain in a day. *Id.* at 88:29-31. In designing the wastewater treatment facility at the Orange Plant, Chevron represented to state and federal agencies that it had met this statistical standard.[12]

The record in this case proves that Chevron failed to meet this standard. Rather, Chevron

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[11] Pl.'s Ex. 55 (Letter of Apr. 20, 1995 from Dale W. Durr to Terry Lane of the EPA, p. 2) ("Our treatment facility was designed to treat a 5 year, 24 hour rainfall event . . . ."); Pl.'s Ex. 16 (Letter of Aug. 23, 1994 from Charles W. Miller to Georgie Volz of the TNRCC, p. 2) ("This system has been designed to hydraulically handle and treat the combined flows of all process waters and a 5 year 24 hour maximum precipitation event . . . .").

[12] *See supra* note 11. Additionally, various Chevron officials intimated during their depositions that Chevron had met this standard. Pl.'s Ex. 63 (Depo Tr. of Jeffrey Downing at 27:8-11) ("We were a little bit over 7 inches. So we were well within the 5-year, 24-hour event classification."); Pl.'s Ex. 9 (Depo. Tr. of Dale Durr at 86:16-18) ("All I am saying is the system was designed to handle a five-year, 24-hour maximum that we have seen. That was the basis for the design.").

selected a rainstorm that occurred on June 1, 1992 as the basis for the design of the wastewater treatment facility at the Orange Plant. Tr. at 89:20-23. Jeffrey Downing, an engineer and former employee at the Orange Plant, claims that Chevron made that choice because "some actual event was needed in order to base a design on." Pl.'s Ex. 63 (Depo. Tr. of Jeffrey Downing at 21:6-7).

Chevron has stated that the June 1992 rainstorm was the most severe rainstorm in the history of the Orange Plant. *Id.* (Depo. Tr. of Jeffrey Downing at 13:10-21); Tr. at 119:4-12. Chevron, however, has no data regarding how much rain fell on the Orange Plant during that storm. *See* Tr. at 90:9-10. Unfortunately, the rain gauge at the Orange Plant was broken. *Id.*

According to data maintained by the National Weather Service, the Jefferson County Airport received 3.35 inches of total rainfall on June 1, 1992. *Id.* at 90:2-6; *see also* Pl.'s Ex. 65, p. 20. Moreover, six and a half inches of rain fell on facilities near the Orange Plant. Tr. at 119:16-29. Thus, the rainfall during the June 1992 storm was less than the rainfall that would result from a five-year, twenty-four hour storm event. *See* Pl.'s Ex. 65, figure 6-3. Chevron's expert, Dr. Lial Tischler, previously acknowledged this disparity. Pl.'s Ex. 64 (Depo. Tr. of Lial F. Tischler at 40:12-14) (stating that "it appears that [the June 1st, 1992 storm] probably was not a five-year-24-hour event but something somewhat less than that").

Dr. Tischler never analyzed whether Chevron designed the wastewater treatment facility at the Orange Plant properly. Tr. at 591. Nor did he initially determine whether the June 1992 storm equaled the five-year, twenty-four hour storm. Pl.'s Ex. 64 (Depo. Tr. of Lial F. Tischler at 40:5-8). He did, however, admit that Chevron did not design the Orange Plant to withstand a five-year, twenty-four storm. *Id.* (Depo. Tr. of Lial F. Tischler at 40:12-14).

The concept of the five-year, twenty-four hour storm is not a required industry standard. Tr.

at 138. It is, however, the standard that Chevron sought to duplicate–yet failed to achieve–in designing the wastewater treatment facility at the Orange Plant. *See, e.g., id.* Thus, Chevron designed that facility improperly.[13] The affirmative defense of upset is inapplicable in this case and unavailable to Chevron. *See* § 122.41(n)(1).[14]

Because Chevron cannot assert the upset defense, Chevron is liable for the TSS violations that occurred on April 10, 1995, on August 30, 1996, and on September 17, 1997. *See id.*[15] Each of these post-complaint TSS violations, standing alone, establishes statutory standing. *See Carr*, 931 F.2d at 1065 n.12 ("[P]roof of an actual violation subsequent to the complaint is conclusive.").[16] Consequently, Friends of the Earth has established statutory standing. *See id.*

Chevron argues that each of its post-complaint TSS violations is an upset because it achieved ninety-nine percent compliance with its TSS limitations. Def.'s Post-Appeal Proposed Findings of

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[13] *Cf.* THE AMERICAN HERITAGE DICTIONARY 349 (1989) (defining the word "improper" to mean "[n]ot suited to needs or circumstances," "unsuitable," and "[n]ot consistent with fact"). Chevron's actual design of the wastewater treatment facility at the Orange Plant is inconsistent with what Chevron told the EPA regarding that facility as well as inconsistent with the five-year, twenty-four hour storm. Thus, the word "improper" aptly describes the Orange Plant's design.

[14] Indeed, as Friends of the Earth's expert, Dr. Bruce Bell, testified, if Chevron had designed the wastewater treatment facility at the Orange Plant to withstand a five-year, twenty-four hour storm, Chevron would not have committed post-complaint TSS violations. Tr. at 99:23-100:2.

[15] Because the court concludes that the wastewater treatment facility at the Orange Plant was improperly designed and does not meet the standard that Chevron itself chose, the court also concludes that the wastewater treatment facility at the Orange Plant is inadequate. The court need not, however, address the questions of whether Chevron committed operator error, whether Chevron properly maintained the Orange Plant, or whether the Orange Plant suffered from a lack of preventative maintenance.

[16] Consequently, the court need not answer the question of whether there was a likelihood of recurring violations by Chevron at the time Friends of the Earth sued Chevron.

Fact and Conclusions of Law at ¶ 94 (Dkt. #120). In making this argument, Chevron relies on *Chemical Manufacturers Association v. EPA*, 870 F.2d 177 (5th Cir. 1989), *reh'g granted, amended by* 885 F.2d 253, 256 (5th Cir. 1989), and on *American Petroleum Institute v. EPA*, 661 F.2d 340 (Former 5th Cir. 1981). Both cases, Chevron claims, support its interpretation of the upset defense.

In neither case, however, did the Fifth Circuit either interpret or examine what constitutes an upset. *See Chem. Mfrs. Ass'n*, 870 F.2d at 229-30; *Am. Petroleum Inst.*, 661 F.2d at 350-51. Nor did the Fifth Circuit hold that ninety-nine percent compliance with a technology-based NPDES permit mandates a finding that permit violations are upsets. *See Chem. Mfrs. Ass'n*, 870 F.2d at 229-30; *Am. Petroleum Inst.*, 661 F.2d at 350-51. Nor does Chevron's interpretation of the upset defense find either explicit or implicit textual support. *See* § 122.41(n)(1).[17] Accordingly, Chevron's interpretation of the upset defense is unconvincing.

"[T]he Clean Water Act recognizes neither a good faith nor a de minimis defense." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1083 (D.N.J. 1990). Instead, courts determine whether a permittee has violated that statute by applying strict liability principles and examining the text of that statute. *See, e.g., Menzel v. County Utils. Corp.*, 712 F.2d 91, 94 (4th Cir. 1983). Similarly, one should interpret the upset defense according to that term's plain meaning. *Cf., e.g., Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 630 (D. Md. 1987). Either the defendant satisfies the conditions of the upset defense or that defendant cannot rely on the upset defense. *See* §§ 122.41(n)(1), 122(n)(3)(i)-(iv).

Accepting Chevron's argument regarding ninety-nine percent compliance would ignore the

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[17] Dr. Tischler conceded as much at trial. *See* Tr. at 579-84.

plain meaning of the upset provision. The paucity of Chevron's post-complaint TSS violations does not, by itself, mean that each of these violations qualifies as an upset. *See* §§ 122.41(n)(1), 122(n)(3)(i)-(iv). Moreover, Chevron's interpretation of the upset defense is unsupported by Fifth Circuit precedent. Consequently, this argument is unpersuasive. Chevron is liable for three post-complaint TSS violations and for sixty-two pre-complaint TSS violations.

IV.

Chevron notes, correctly, that it has not violated the TSS limitations in its NPDES permit for several years. Moreover, Chevron argues that the 1996 TSS limitations will help ensure that future permit violations will not occur. Consequently, Chevron claims that this lawsuit is moot.

The burden to prove mootness is on the party claiming that a case has become moot. *Laidlaw Envtl. Servs, Inc.*, 528 U.S. at 189. This burden is quite a heavy one. *Id.* "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Id.* at 174. Rather, a case is moot only if subsequent events have made it absolutely clear that permit violations "could not reasonably be expected to recur." *Id.* at 193 (citation omitted).

As Plaintiffs note, Chevron violated its TSS limitations in September 1997, just one year after its new TSS limitations were adopted. This TSS violation, for reasons previously explained, is not an upset. Moreover, the court has found that Chevron designed the wastewater treatment facility at the Orange Plant improperly. Thus, Chevron has not established that it is absolutely clear that its permit violations could not reasonably be expected to recur. Chevron's compliance over the last several years does not demonstrate that this case is moot.

V.

The court has found that Chevron is liable for sixty-five violations of the TSS limitations in

its NPDES permit.[18] Accordingly, the court will contact counsel for both sides in the near future to schedule a hearing. At that hearing, the court will determine Friends of the Earth's remedies, such as civil penalties, attorney fees, costs, and injunctive relief.

It is so ORDERED.

Signed this the twentieth day of July, 2004.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

[18] The court previously denied Plaintiffs' motion for reconsideration of its ruling that Chevron's pH violations are barred. Thus, Chevron is not liable for any pH violations.

Other Orders/Judgments

1:94-cv-00434-RAS Friends of the Earth v. Chevron Chemical Co

U.S. District Court [LIVE]

Eastern District of TEXAS LIVE

Notice of Electronic Filing

The following transaction was received from tkd, entered on 7/20/2004 at 4:20 PM CDT and filed on 7/20/2004

Case Name: Friends of the Earth v. Chevron Chemical Co
Case Number: 1:94-cv-434
Filer:
Document Number: 127

Docket Text:
FINDINGS OF FACT AND CONCLUSIONS OF LAW. Signed by Judge Richard A. Schell on 7/20/04. (tkd,)

The following document(s) are associated with this transaction:

Document description: Main Document
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1:94-cv-434 Notice will be electronically mailed to:

Carolyn Smith Pravlik cpravlik@tpmlaw.com, tpminfo@tpmlaw.com

James Edward Smith jsmith@bmpllp.com,

1:94-cv-434 Notice will be delivered by other means to:

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[redacted]

Enclosure 2

Gene B. Strait, Environmental Department
5309 FM 1006 ■ Orange, Texas 77630 ■ P.O. Box 7400 ■ Orange, Texas 77631
(409) 882-6738 ■ e-mail: straieb@cpchem.com ■ Fax: (409) 882-6297

October 17, 2002

Certified • Return Receipt 7099 3220 0001 2786 1375

Ms. Teresa Arroyo
TCEQ/WQCMT (MC224)
Enforcement Division
P.O. Box 13087
Austin, Texas 78711-3087

September 2002 Discharge Monitoring Report
Annual Analysis of 52 Subpart J Organic Compounds
Chevron Phillips Chemical Company LP - TPDES Permit No. 00359

Dear Ms. Arroyo:

Enclosed is the September 2002 Discharge Monitoring Report for the Chevron Phillips Chemical Company plant located in Orange, Texas. Also, included are the completed DMR forms for the annual testing for 52, Subpart J, organic compounds.

Our facility experienced one exceedance of the daily maximum permit limit for Total Suspended Solids (TSS) during this reporting period. The TSS concentration of the effluent composite collected on September 20, was 164 ppm. The permit maximum daily limit for TSS is 127 ppm. We do not believe this exceedance endangered human health or safety, or the environment. The wastewater treatment facilities were being run properly at the time.

An investigation concluded that the cause of the exceedance was an abnormally intense rain storm that caused a very rapid and prolonged surge of stormwater flow into the settling basin, named the cube pond, that provides the final treatment to the wastewater before discharge at outfall 001.

Treatment in the cube pond consists of skimming of floating material and providing retention time for the settling of solids when flows exceed the capacity of the dissolved air flotation system to treat all stormwater. We believe the intensity and duration of the stormwater surge into the cube pond "stirred up" the settled solids, which consist predominately of sediment that has fallen to the bottom of the pond. We believe this event caused the solids to be discharged with the stormwater and was most likely the basis for the elevated TSS. The results of laboratory analyses of the sample composite and the sediment on the bottom of the cube pond support this conclusion.

The TSS noncompliance was temporary and unintentional. Although our TPDES permit does not contain language addressing upset conditions, we believe the event causing the TSS exceedance meets the criteria of an "upset", as defined at 40 CFR 122.41(n)(1). Also, under the Texas Water Code § 7.251, when an event is caused by an act of God it should not [illegible]

applicable statute, rule or permit. We believe this noncompliance event satisfies the criteria in the statute and that this event is not a violation under state law.

If you have any questions, or if additional information is required, please contact me at (409) 882-6738.

Sincerely,

← ORignal Signed

Gene B. Strait
Environmental Department

cc: 202.17

Chevron Chemical Company
P.O. Box 7400, Orange, TX 77631-7400 • Phone (409) 886-7491

Orange Plant

August 3, 1994

Ms. Terry Lane
Environmental Specialist
U.S. Environmental Protection Agency
Water Management Division
Enforcement Branch (6W/EA)
1445 Ross Avenue
Dallas, Texas 75202-2733

Re: Administrative Order Docket No. VI-94-0182
Chevron Chemical Company NPDES Permit No. TX0004839

Dear Ms. Lane:

On July 5, 1994, we received Administrative Order Docket No. VI-94-0182 which was issued from the office of Myron Knudsen on June 29, 1994. This order references violations of our previous permit, No. TX0004839, issued on September 29, 1989 and effective on October 30, 1989.

Beginning with the third violation listed on page 5 of the Order, dated 10/4/90, the entire list of violations up to and including the 2/93 violations on page 7 have been covered by previous Administrative Orders. These Orders are as follows: AO VI-92-0018, dated 11/29/91; AO VI-92-0110, dated 3/19/92; AO VI-92-0079, dated 6/2/92; and AO VI-93-1099, dated 7/20/93. Each of these Administrative Orders (with the exception of AO VI-92-0079) was addressed by outlining steps which our facility would take to eliminate future occurrences of non-compliance. These steps were implemented according to schedules included in our responses, and interim updates of our implementation progress were submitted. All of the above referenced Orders were administratively closed to EPA's satisfaction according to correspondences received from EPA Region 6 Enforcement staff.

Order Response

Referencing a previous response to AO VI-93-1099, dated August 25, 1993 and addressed to Mr. James L. Graham, Chief of Region 6 Compliance Section, this facility is in the process of implementing a multi-million dollar wastewater treatment system upgrade. This system has been designed to hydraulically handle and treat the combined flows of all process waters and a 5 year 24 hour maximum precipitation event and produce an effluent that will comply with all permit parameters.

The system will utilize a 45 foot diameter Dissolved Air Flotation clarifier, supplemented by upstream rotating screen elements to remove larger solids. The design of this upgrade has changed since the August 25, 1993 AO response such that our total financial commitment to this project is now $4.25 million. The current construction schedule calls for full implementation of the system by December 1994. We are making concerted efforts to reduce the timeline by at least one month, and at this point it seems feasible to have a major portion of the system on-line by the end of October 1994.

PLAINTIFF'S EXHIBIT

Further operational and housekeeping measures and projects are planned for implementation this year. While all these measures are labor-intensive, expensive and time-consuming, we are certain that these measures alone will prevent the recurrence of violations of our permitted loading limits.

After start-up of the DAF system in the fourth quarter of this year, we will be able to achieve full and continuous compliance with all permit parameters for the life of this permit.

If there are any questions or comments, or if additional information is required, please contact either Dale Durr or myself at (409)-886-7491.

Sincerely,

Charles W. Miller
Plant Manager

cc: Taylor Sharpe, EPA Region 6 Enforcement
Mike Smith, Attorney, Chevron Chemical Company
Dale Durr, Chevron
Terry Cunningham, Chevron

Enclosure 4

Chevron

Chevron Chemical Company
Orange Plant
P.O. Box 7400, Orange, TX 77631-7400 • Phone (409) 886-7491

Charles W. Miller
Plant Manager
Orange Plant

August 23, 1994

Mrs. Georgie Volz
Water Quality Program Manager
TNRCC Region 10
4820 Ward Drive
Beaumont, TX 77705-0328

Re: Chevron Chemical Company WQ Permit No. 0000359-001
Industrial Wastewater Facility Inspection Report Response

Dear Mrs. Volz:

On August 1, 1994, we received the Industrial Wastewater Inspection Report which was generated from the May 26, 1994 facility inspection by Patrick Marcyniuk of your staff. As requested in the cover letter of the report, we will inform your office in this letter of the steps we will take to correct the violations/deficiencies listed in the report, and provide a timetable for implementation of corrective measures. We will also take this opportunity to comment on statements made in the report.

A. Violations and Deficiencies

The cover letter to the inspection report refers to certain violations/deficiencies which are noted as outlined in Section E of the inspection report. The violations/deficiencies listed at Section E are previously reported permit limit exceedances which were gathered during Mr. Marcyniuk's review of our records on-site. In the paragraph below the listed permit exceedances, the report comments on two other aspects of this list.

1. The first comment specifies certain list entries, and states "These measurements are violations of the new higher NPDES Discharge Limitations (Effective Date 5/1/94 - Page 2 of PART 1: SECTION A. EFFLUENT LIMITATIONS AND REPORTING REQUIREMENTS of the NPDES permit)..." however, the list covers the reporting periods from 1/93 to 3/94. Therefore, these measurements could not be violations of any kind, since the new permit did not yet exist (effective date 5/1/94).

It is a misstatement of fact to consider these measurements violations of a permit limit when the measurements were taken before the permit limits existed. It would be correct and prudent to state that these measurements would have been violations of the new NPDES permit, had they been sampled and reported after the effective date of 5/1/94.

2. The second comment in this paragraph discusses the fact that certain measurements which are greater that 40% over permitted limits must be reported orally within 24 hours and in writing within 5 working days to the regional office, as stated in MONITORING AND REPORTING, No. 7(b) Noncompliance Notification, on page 4 of the state permit.

We spoke with Mr. Marcyniuk on August 8, 1994 regarding this statement. We were unsure as to whether it meant he had not received any notification on these events. He indicated that he could not find record of receiving either 24 hour oral notification or 5 day written notification. We assured Mr. Marcyniuk that these requirements had been satisfied and that we would include copies of the 5-day notifications with our response. The copies of these notifications are attached to this letter.

PLAINTIFF'S EXHIBIT 16

006989

Chevron

III. Process Area Changes

a. E&I to inspect Filtomats daily for proper operation.
b. Maintenance to inspect filter cartridges weekly for cleaning.
c. Keep SRA mud pond effluent return pump operating.
d. Investigate ways to make HDPE lagoon more efficient.
e. Keep bucket conveyors operating continuously.

IV. Storm Surge Controls

a. Operate storm water retention tank. This system is now capable of retaining 2.2 million gallons of storm water runoff.
b. Operate C-loop gate valves on heavy rain days. This system withholds 1/3 of the total plant surface area runoff.

Further operational and housekeeping measures and projects for storm water pollution prevention are planned for implementation this year. While all these measures are labor-intensive, expensive and time-consuming, we are certain that these measures alone will prevent the recurrence of violations of our permitted loading limits. The start-up of the DAF system in the fourth quarter of this year will enable us to maintain full and continuous compliance with all permit parameters for the life of our TNRCC permit.

If there are any questions or comments, or if additional information is required, please contact either Dale Durr or myself at (409)-886-7491.

Sincerely,

Charles W. Miller
Plant Manager

cc: US EPA Region 6
Compliance Section
Dallas, TX

Dale Durr, Chevron

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Enclosure 5

Friends of the Earth vs. Chevron Chemical Terry Cunningham, 11/15/95

PAGE 1 TO PAGE 138

O'Neal-Probst Associates, Inc.

(713) 650-1434

CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY:

O'NEAL-PROBST ASSOCIATES, INC.
1415 Louisiana, Suite 1400
Houston, TX 77002
Phone: (713) 650-1434
FAX: (713) 650-1438

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FRIENDS OF THE EARTH, INC., Plaintiff, vs. CHEVRON CHEMICAL COMPANY Defendant.) Civil Action No. 1:94CV434) Civil Action No. 1:94CV500

DEPOSITION OF TERRY CUNNINGHAM

November 15, 1995 Houston, Texas

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TESTIMONY OF: TERRY CUNNINGHAM

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Exhibit No. 19....06
Exhibit No. 20....06
Exhibit No. 21....06

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APPEARANCES:

FOR THE PLAINTIFF
FRIENDS OF THE EARTH, INC.:

Terrell, Pravlik & Wagner
1121 Twelfth Street, N.W.
Washington, D.C. 20005
By: Ms. Carolyn Pravlik

FOR THE DEFENDANT
CHEVRON CHEMICAL COMPANY:

Baker, Hayward & Parsons, LLP
First Interstate Tower, 25th Floor
1300 Post Oak Boulevard
Houston, Texas 77056
By: Mr. Jim Smith

Also Present: Mr. Bruce Ball
Mr. Dale Durr

Page 4

The oral deposition of TERRY CUNNINGHAM was taken on November 15, 1995, in the offices of Baker, Hayward & Parsons, 1300 Post Oak Boulevard, 25th Floor, Houston, Harris County, Texas, beginning at 9:15 a.m., Before James G. Ellis, a Certified Shorthand Reporter and Notary Public in and for the State of Texas, pursuant to Notice, the Federal Rules of Civil Procedure, and under the following agreement of counsel for the respective parties that:

The deposition may be signed by the witness before any Notary Public or officer authorized to administer oaths.

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(Deposition Exhibit Nos. 14-21 were marked for identification)

THE REPORTER: Any stipulations or agreements?

MS. PRAVLIK: No stipulations for me. I don't know what that means. Unless you want to propose something?

MR. SMITH: No.

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TERRY CUNNINGHAM, having been first duly sworn, testified as follows:

EXAMINATION BY MS. PRAVLIK:

Q Good morning, Mr. Cunningham.

A Good morning.

Q I'm going to show you an affidavit that I believe has your name across the top. Did you execute that affidavit as part of this case?

A Yes.

Q Just for the record, that affidavit has previously been marked as Deposition Exhibit No. 9.

Has your education changed any since the time you executed that affidavit?

A Not the education, no.

Q Has your job at the Orange plant changed since you executed that affidavit?

A Yes and no, if that makes any sense.

Q Not without explanation it doesn't.

A There is a project that is going to be -- one of our production that will be expanded. And I will be the general project manager of that project when it's started.

Page 7

Q That's at the Orange facility?

A The Orange facility.

Q What is that expansion project?

A The gas phase reactor in high density will be expanded in its production capability, as soon as we get an agreement with the licensing entity we are dealing with.

Q How long have you worked at the Orange Plant?

A June was 14 years.

Q In that 14-year span of time what positions have you held?

A I started as an operations specialist in the low density operation. I worked there for two and a half years -- excuse me, one and a half -- Worked as a high density operations specialist for one year. Was assistant superintendent for the high density operations for a year and a half. I was low density operations superintendent for two and a half years. And I was high density operations superintendent for five years. And I have been at the present job for a little over three years, as a manager of engineering maintenance.

Q Did you play a role in the design of the

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upgrade to the wastewater treatment plant that was done in 1994?

A Yes, I did.

Q What was your role?

A We decided -- I decided on how we should attack the problem of excursions on the plant's permit. Decided and got agreement with the plant manager to go out outside of our engineering department to enlist Bechtel to do a study on trying to characterize the wastewater system, the wastewater loadings, and propose technology that would bring us into compliance.

It goes further than that, if you would like to go further.

Q I want to know the whole role. But before you go a little further, when you say "proposed technology," does that mean that you were proposing technology --

A No.

Q -- or you were getting Bechtel to propose technology?

A We were expecting Bechtel to propose technology.

Q Okay.

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A After Bechtel presented the conceptual study, I had the engineering department prepare a scoping document, go out for quotes, and reviewed the scoping document and reviewed the bid package and then reviewed the bids from the individual contractors. I, with the design team -- there was a design team formed with the Bechtel work back in January of '93, consisting of operations -- excuse me, consisting of engineering people, Bechtel people and environmental people.

The proposals came in, and I participated in the review of those proposals. The design team and I made

water won't get your feet wet water runs (24) all through the suspended floor and all of (25) your cabling - if there are any faults, you

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(1) can have some very expensive repairs, as well (2) as some downtime on your reaction units.
(3) Q So does the surge tank really increase the (4) retention capacity of the high density area or (5) does it just allow you to retain water in the (6) tank as opposed to in the control room or some (7) other area behind the rice gates?
(8) A In my mind it does both. It does both. There (9) is a limit to how much we can retain, you (10) know, behind the rice valves. And once that's (11) exceeded we're going to have some pretty (12) severe street flooding. And the high density (13) control room is not one of the areas that's (14) extremely high off the ground. It is one of (15) the areas that will flood. And it has (16) flooded. The maintenance shops, which are (17) right behind the control room, are another (18) area that floods if we get bad street (19) flooding.
(20) Q If that floods, where is that water going? Is (21) it going to the wastewater treatment plant or (22) is it being retained there?
(23) A Those all flow back in the same ditches - it (24) winds back up around the storage tank and back (25) to the - behind the rice valves. All that

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(1) surface drainage will go - will be retained.
(2) That case, in particular, is not as much a (3) function of - it's a function mainly of very (4) intense rainfall. And the capacity hasn't (5) been reached necessarily in the ditches, fire (6) pond, in that flooded area in high density, as (7) much as the differential in height between all (8) the ditches. And it hasn't all leveled out (9) yet.
(10) Q I'm not sure I understood that. What do you (11) mean, "leveled out yet"?
(12) A As the flow is coming from all over the plant, (13) the areas with the smallest drainage ditches (14) always back up first. It's more of a backup (15) problem - water backing up into the high (16) density area because the ditches aren't large (17) enough to carry it over; it's not as much of a (18) function of is there adequate storage all over (19) the plant.?
(20) MR. SMITH: Would bottleneck a (21) good word?
(22) THE WITNESS: Right, bottleneck is (23) another way of putting it.
(24) A If you keep those ditches at a lower level by (25) running those pumps and using those storage

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(1) tanks, you will have an increased amount of (2) flow through the ditches and get those ditches (3) at a lower level in the process units. So, it (4) does enhance storage.
(5) Q If you compare the setup where you have the (6) surge tank and the rice gates working in (7) conjunction, rice gate valves working in (8) conjunction with one another, as compared to (9) the rice gate valves alone, which scenario (10) results in a lower rate of water going to the (11) wastewater treatment plant?
(12) A One more time, please. I think I heard (13) something at the end that I thought -
(14) Q I want to compare the rice gate valve/surge (15) tank combination with the rice gate valve (16) alone -
(17) A Okay.
(18) Q - situation. And I want to know which of (19) those two situations, or scenarios, results in (20) a lower rate of water going to the wastewater (21) treatment plant.
(22) A They're the same.
(23) Q They're the same?
(24) A They should be the same.
(25) Q Why are they the same?

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(1) A Unless you flood the streets over by the rice (2) gate valve, the water shouldn't be able to (3) leave the rice gate valve. All the water (4) backed up behind the rice gate valve includes (5) the ditches by the wastewater surge tank. So (6) all that is behind - the water flows on a (7) path from the process units - what I think of (8) as the beginning - along the very southern (9) part of the plant, makes a corner by the (10) wastewater unit, then goes in a straight path (11) towards the CPF unit, then turns again north (12) and heads for the high density pond. As it (13) turns north, before it gets to the pond, and (14) the two rice valves are there, closing those (15) two valves backs all the ditches up behind it, (16) including the ditches where the surge tank (17) is.
(18) So, closing those two valves, you (19) know, gives you all that storage of the (20) ditches, the southeast corner of the high (21) density area, and the pond, the fire pond.
(22) All right. Which will give a certain ditch (23) height.
(24) Q Uh-huh.
(25) A Water flows on the principal of height, from

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(1) higher to lower. And the lower you can run (2) that ditch level, the higher you can drain the (3) other areas. If you had a backup or a (4) bottleneck, as Jim was saying, in the process (5) areas, which is the very farthest part away (6) from the whole system, the lower you can get (7) those ditches leveled down, the higher - the (8) faster they can drain.
(9) So, there is a process advantage of (10) getting those areas unflooded quickly. Other (11) than that, it just gives you an enhanced (12) capability of 2.2 million gallons of surge (13) capacity above what you have in the ditches.
(14) MR. SMITH: Off the record.
(15) *(Discussion held off the record)*
(16) Q (By Ms. Pravlik) Prior to the installation of (17) the surge tank, how often did you have a (18) situation where the streets beyond the rice (19) gate valves got flooded such that you had the (20) runoff going to the cube pond?
(21) A How often?
(22) Q Uh-huh.
(23) A I can't remember a time when I was operations (24) superintendent of high density. You'd need to (25) ask Morris Duhon.

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(1) Q Would you remember such an occurrence?
(2) A Oh, yes.
(3) Q Would that be really an unusual situation?
(4) A Oh, yes. If you're flooded at that point, (5) then you're flooded back at the reactor pretty (6) severely. I think I would remember it. I (7) don't recall in. The rice valves were put in (8) in '90 or '91, I believe, with the CPF (9) project. And I remember a pretty good control (10) room flooding, but I don't believe it got over (11) the streets in that part of the plant.
(12) Q What kind of rain event would it take to have (13) the situation where the streets on the other (14) side of the rice gate valves were flooded and (15) you had the sheet flow to the cube pond?

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Carolyn Smith Pravlik
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